IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

NO. 87-2073 (3)

RICHARD L. DUGGER,

Petitioner,

v.

LARRY EUGENE MANN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX IN SUPPORT OF RESPONDENT'S BRIEF IN OPPOSITION

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1. 11th Circuit En Banc Initial Brief of Appellant, dated October 23, 1987.

2. Excerpts to 11th Circuit En Banc Initial Brief of Appellant, reflecting statements, comments and instructions made by prosecutor and trial judge in violation of Caldwell v. Mississippi

3. 11th Circuit En Banc Reply Brief of Appellant, dated December 7, 1987

APPENDIX 1

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Docket No. 86-3182

LARRY EUGENE MANN,

Petitioner-Appellant,

versus

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

EN BANC INITIAL BRIEF OF APPELLANT

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Preference: Habeas Corpus, Rule 11, App. 1(a)(3), En Banc

CERTIFICATE OF INTERESTED PERSONS

The following have an interest in this appeal:

1. The petitioner-appellant, Larry Eugene Mann.

2. The respondent-appellee, Richard L. Dugger, Secretary, Florida Department of Corrections.

3. The Honorable Elizabeth A. Kovachevich, United States District Judge for the Middle District of Florida.

4. Present counsel for the petitioner: Talbot D'Alemberte.

5. Counsel for the respondent: Robert Butterworth, Attorney General of the State of Florida.

Talbot D'Alemberte

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PRELIMINARY STATEMENT

References to the district court record follow the procedure authorized by the Court, i.e., "R (Vol. #) - (Doc. #) - (Page #)." References to the trial transcript and the record on appeal of Mr. Mann's trial in the Circuit Court for the Sixth Judicial Circuit, in and for Pinellas County, Florida, are cited "ROA - (Page #)." References to the transcript and record on appeal of the resentencing hearing are cited "RROA - (Page #)." References to the Supplemental Record, the Record on Appeal are cited "SR - (Doc. #) - (Page #)." References to the Appendix to the Petition for Writ of Habeas Corpus, R1-2, are cited "Pet. App. - (Volume #) - (Section #) (Page #, Attachment #) (Exhibit #)."

References to the Appendix to this brief appear as "A-#".

STATEMENT REGARDING PREFERENCE

This is an appeal from the denial of a petition for a writ of habeas corpus, pursuant to 28 U.S.C. sec. 2254, by the United States District Court for the Middle District of Florida. Preference in processing and disposition of this case is based upon Rule 11, Rules of the United States Court of Appeals for the Eleventh Circuit, Appendix 1(a)(3). This case has now been set for en banc argument before the Court.

REQUEST FOR ORAL ARGUMENT

This case has been set for en banc consideration, and Mr. Mann, through counsel, requests the opportunity to present oral argument.

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STATEMENT OF THE ISSUES PRESENTED 1/

I. Whether systematic comments by the trial judge and prosecutor throughout the course of the proceedings resulting in Mr. Mann's sentence of death diminished the jurors' sense of responsibility for the capital sentencing task that they were to perform, in violation of Caldwell v. Mississippi and the eighth and fourteenth amendments?2/

II. Whether Mr. Mann's involuntary absence from a jury view conducted during the course of his capital trial at which important testimony was taken from the lead investigative detective violated the Confrontation Clause and the sixth, eighth, and fourteenth amendments?3/

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1. The Court has set Mr. Mann's case for en banc consideration without limiting consideration to any specific issue. This is consistent with the practice in this Circuit of hearing all issues in an en banc case, without limiting consideration to the issue which may have prompted en banc review. E.g., Moore v. Kemp, 809 F.2d 702, 708-09 (11th Cir. 1987)(en banc); Hitchcock v. Wainwright, 770 F.2d 1514, 1516 (11th Cir. 1985)(en banc); Brooks v. Kemp, 762 F.2d 1383, 1387 (11th Cir. 1985)(en banc). Mr. Mann incorporates by reference each of the arguments and citations of authority presented in the briefs, supplemental authorities, and motion for rehearing previously presented to the panel. By referring the en banc Court to his earlier submissions, Mr. Mann presents those issues and arguments for the en banc Court's review.

This brief specifically discusses four issues--those which Mr. Mann believes will be of greatest interest to the en banc Court. Mr. Mann respectfully refers the court to his earlier submissions with regard to the other issues presented in this proceeding. Additionally, with respect to the issues discussed in this brief, Mr. Mann has not repeated each of the supporting arguments presented to the panel.

2. Presented as part of Issue III of the panel brief. Mr. Mann's presentation of this claim to the panel also included a due process and eighth amendment challenge to the gross prosecutorial misconduct which directly resulted in his capital conviction and sentence of death (Initial Brief, Issue III, pp. 37-40; Reply Brief, pp. 21-22). The panel denied relief on this aspect of Mr. Mann's claim. In this brief Mr. Mann will not specifically discuss aspects of the prosecutor's misconduct which do not directly relate to his Caldwell v. Mississippi claim. He urges, however, that the en banc court reconsider this issue and grant habeas corpus relief for the reasons presented in his petition for panel rehearing (p. 14).

3. Presented as Issue I of the panel brief.

III. Whether the death sentence imposed on Mr. Mann in substantial reliance on an unconstitutional prior conviction violates the eighth and fourteenth amendments?4/

IV. Whether Mr. Mann's sentence of death violates Doyle v. Ohio and the fifth, sixth, eighth, and fourteenth amendments because it was based on a recommendation of death obtained from a jury which was told that Mr. Mann "showed" no remorse after a post-arrest, post-Miranda warnings invocation of his right to silence?5/

V. Whether the failure of the court during the sentencing phase of the trial to give a requested jury instruction that the jury could properly consider absence of flight as a mitigating factor constitutes a violation of the eighth and fourteenth amendments?6/

VI. Whether the failure of the jury form to indicate whether the conviction was based upon a finding of actual intent on a premeditation theory, or merely imputed intent on a felony murder theory, coupled with the failure of both the trial court and the appellate court to make a finding of actual intent, renders the sentence of death invalid under the eighth amendment?7/

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4. Presented as Issue IV of the panel brief.

5. Presented as Issue V of the panel brief.

6. Presented as Issue II of the panel brief. This issue is not detailed again herein. Mr. Mann respectfully refers the Court to his panel submissions in this regard.

7. Presented as Issue VI of the panel brief. This issue is not detailed again herein. Mr. Mann respectfully refers the Court to his panel submissions in this regard.

STATEMENT OF THE CASE 8/

I. FACTS RELATING TO THE TRIAL COURT'S AND PROSECUTOR'S DIMINISHING OF THE JURORS' SENSE OF RESPONSIBILITY

At all trials there are only a few occasions when jurors learn of their proper role. At voir dire, the prospective jurors are informed by counsel and, on occasion, by the judge about what is expected of them. When lawyers address the jurors at the close of the trial or a segment of the trial, they are allowed to give insights into the jurors' responsibility. Finally, the judge's instructions inform the jury of its duty. In Mr. Mann's case, at each of those stages -- voir dire, closing arguments, judicial instructions -- the jurors received misleading information which diminished their sense of responsibility for the awesome capital sentencing task that the law would call on them to perform.

1. Voir Dire: Prosecutor's Comments

Every prospective juror sat in the courtroom during the entire jury selection process, and every juror heard each remark made by the prosecutor and the judge.

---

8. Mr. Mann presented a factual and procedural statement in his initial panel brief. Here, he presents the facts most directly pertinent to his Caldwell v. Mississippi claim and to his claim that his involuntary absence from critical jury view proceedings during the course of his capital trial violated his sixth, eighth, and fourteenth amendment rights. The facts relating to the unconstitutionality of the Mississippi conviction used to sentence Mr. Mann to death are discussed in Mr. Mann's initial panel brief (Issue IV, pp. 40-64) and in his petition for a writ of habeas corpus. R., Vol. 1. The facts relating to the State's unconstitutional elicitation and use of Mr. Mann's post-conviction, post-Miranda warnings silence are discussed in the initial panel brief (Issue V, pp. 64-66), in Mr. Mann's petition for a writ of habeas corpus, R., Vol. 1, and in Mr. Mann's petition for panel rehearing (pp. 12-14).

> go back and to deliberate that issue. Obviously, if the jury finds him to be innocent, they come back and say so, and he walks out of the courtroom and that's the end of that.

(ROA 1215).

But there is another phase, the prosecutor lectured the entire venire, where the rules of responsibility change. If the jury convicts:

> [T]he jury then has the opportunity to go back and determine whether or not you will come back and make a recommendation of mercy to the Court.
>
> The recommendation that you make to Judge Federico in this portion of the trial is simply a recommendation and he is not bound by it. He may impose whatever sentence the law permits. He will have been here and will have listened to all the testimony himself.

(ROA 1216)(emphasis added).

This concept of vastly different responsibility for the two phases of the trial became the central theme of the voir dire. The prosecutor:

> Okay. Are we all now up to speed on where we're going? Do you understand that the first portion of the trial relates to guilty/not guilty? The second portion of the trial involves different evidence, different testimony, the possibility of that, in deeming whether you will recommend to the judge mercy in dealing with the Defendant? Does everybody understand that that's the procedure that will be followed in this case now?

(ROA 1217)(emphasis added).

In case the venire did not understand his use of the word "recommend" in this statement, the prosecutor immediately referred back to the dialogue he had with Dr. Lee, a short time (two transcript pages) earlier:

> Do any of you have feelings, as Doctor Lee did, with regard to the imposition of the death penalty, that possibility?

(ROA 1218).

If there were those who felt that responsibility, the prosecutor immediately let them know that it was not their job. He told the venire:

> You understand you do not impose the death penalty: that is not on your shoulders. The ultimate decision rests with Judge Federico.

(ROA 1218)(emphasis added).

The prosecutor hammered this theme over and over, throughout the voir dire:

> Again, that decision rests up here with the law, with Judge Federico. You will have the opportunity after you have heard everything there is to make a recommendation to him.

(ROA 1218)(emphasis added).

The prosecutor quickly added his misleading explanation of the term "recommendation":

> But it is not legally on your shoulders, though. It is not your ultimate decision. You act in that regard in an advisory capacity only.

(ROA 1218-19)(emphasis added).

This misleading definition of "advisory" and "recommendation" was repeated throughout the voir dire (E.g., ROA 1319 ["you can offer Judge Federico an advisory opinion as to what sentence you think he ought to consider imposing. . . ."]; ROA 1330 [the death penalty "is the judge's responsibility"]; ROA 1363 ["advisory opinion to the Court"].)

The prosecutor continuously returned to this idea:

> [Y]ou do not impose the death penalty. It is authorized by the law in the State of Florida that the Court would impose it should you find the Defendant guilty and should he find it necessary and proper in this case. If not, the alternative is life imprisonment.

(ROA 1363)(emphasis added).

Later, the prosecutor made certain the jurors understood they had no responsibility for sentencing:

> You both understand that the ultimate responsibility rests with the Court; that it's not the jury's responsibility?
>
> (Thereupon, the prospective jurors indicated affirmatively.)

(ROA 1393) (emphasis added).

2. Guilt Phase: Prosecutor's Closing Argument"

We would not expect to encounter any reference to the jury's role in sentencing at the guilt/innocence stage, but we do find it in Mr. Mann's case. Indeed, we find that the prosecutor is so committed to conveying the idea that sentencing was for the judge, not the jury, that he emphasized it in the most important place available to him-- at the very close of his argument:

> The State has done everything that it can do under the system up until this point. You go out, you deliberate your verdict, and you walk back into this courtroom and you tell the Defendant and you tell Judge Federico and you tell the world what you have determined. I submit that if you carefully consider all of the evidence in this case, you'll walk back in with a conviction of guilty as charged of murder in the first degree, guilty as charged of kidnapping. If you do that, we'll reconvene, as we talked about in voir dire. The matter of sentencing ultimately rests with the Court. But I ask you to consider the case carefully. When you come back into the courtroom, look at him, give him the justice that he demands of us. Give him the justice that he didn't give to Elisa Nelson. Thank you.

(ROA 2272-73) (emphasis added).

3. Guilt Phase: Judge's Instructions

The trial judge's instructions to the jury made very strong statements about the jurors' duty to "disregard the consequences of your verdict" (ROA 2329). The

instructions strongly suggested that, after the verdict, the jurors' real work was over:

> When you have determined whether the Defendant is guilty or not guilty, you have completely fulfilled your solemn obligation under your oaths.

(ROA 2330).

4. Sentencing Phase: Closing Argument

In the prosecutor's penalty phase arguments he continued to use the term "recommendation" without ever attempting to give that term its accurate meaning -- without ever disclosing the fact that the jury's sentencing verdict was entitled to great deference (E.g., ROA 2457).

Earlier, the prosecutor made his statements diminishing the jury's role at the very end of his guilt phase closing argument (ROA 2272-73). The same prominence was given to this subject in the sentencing phase arguments and the prosecutor was even more direct9/, adding an additional spin to the proposition that it was the judge who had the sole responsibility. His closing words to the jury were:

> What I'm suggesting to you is that the ultimate responsibility for the imposition of the sentence rests with Judge Philip Federico.
>
> That is his main position in this system.
>
> He's heard everything you have heard.
>
> He may have the opportunity to learn more before he imposes a sentence.

---

9. The prosecutor's penalty phase argument is a textbook example of gross prosecutorial misconduct. The prosecutor's inflammatory comments were directly related to his efforts to diminish the jury's sense of responsibility. Those comments are discussed in the body of Issue I, infra, at n.16. (The argument is reproduced in its entirety in the Appendix annexed to this brief.)

> I think this community, as represented by this jury, should give to him the prerogative of imposing the death penalty, if that's what he ultimately feels is required in this case. Thank you.

(ROA 2439)(emphasis added and sentences separated for emphasis).

5. Sentencing Phase: Preliminary Instructions to the Jury.

The prosecutor's exhortations that the jury shift its sentencing responsibility ("not on your shoulders") to the higher authority -- the judge ("give to him") -- were not cured by any judicial instructions. To the contrary, the judge took the exhortations a step further. His instructions stamped them with the approval of the law.

When adjourning the case for the day after the jury returned its guilty verdict, the judge's first instructions regarding the jury's penalty phase function referred only to the jury's "advisory opinion to the Court" (ROA 2344) without giving any further explanation which would unload the baggage placed on this phrase by the prosecutor.

In fact, when the jury returned, the judge immediately returned to a theme popular with the prosecutor during the voir dire: "The final decision as to what punishment shall be imposed rests solely with the judge of this Court" (ROA 2361)(emphasis added).10/

The judge's preliminary penalty phase instructions continued, compounding the theme which the prosecutor had established:

---

10. Earlier, the defense had sought an instruction on the weight which a jury's sentencing verdict was to be accorded under Florida law (ROA 363). The judge denied the instruction (ROA 2357).

> The final decision as to what punishment shall be imposed rests solely with the judge of this court. However, the law requires that you, the jury, render to the court an advisory sentence as to what punishment should be imposed on the Defendant.

(ROA 2361)(emphasis added).

6. Sentencing Phase: The Court's Final Instructions

Nothing in the court's final sentencing instructions corrected the impressions given at each possible earlier stage of the proceedings. The theme continued to be that the jurors' duty was of little relevance, that the jurors were only to "advise" the court (See, e.g., ROA 2457-59). No explanation of that term was provided to contradict the prosecutor's "not on your shoulders" gloss. Never did the judge or prosecutor tell the jury that their verdict would be accorded great [or any] weight. Rather, the court instructed the jury as follows:

> Ladies and gentlemen of the jury, it is now your duty to advise the court as to what punishment should be imposed on the Defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law which will now be given to you by the Court and render to the Court an advisory opinion.

(ROA 2453-54).11/

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11. Ironically, after the jury returned a recommendation of death and had physically left the courtroom, the judge announced what the jury was not told:

> THE BAILIFF: The jury has left the courtroom.
>
> THE COURT: The Court, as required by law, will give great weight to the recommendation of the jury. . . .

(ROA 2464).

II. FACTS RELATING TO MR. MANN'S INVOLUNTARY ABSENCE CLAIM

The trial court granted the prosecutor's motion for a jury view (ROA 378). The jury was then shepherded to various scenes relating to the alleged offense. Mr. Mann's counsel had previously objected to the jury viewings (ROA 1601; 1175). However, during an in-chambers conference at which Mr. Mann was not present, counsel informed the court that they would waive Mr. Mann's right to be present at the jury viewings (ROA 1174). Defense counsel understood the purpose of the jury viewings to be only to show locations and not to elicit any testimony (ROA 1604, 1609, 1175).

The affidavits proffered to the district court demonstrate that, while Mr. Mann agreed with counsel he did not think it necessary to be present at a "jury view," he did not in any manner waive his right to be present during the taking of testimony at such a jury view (Pet. App., Volume 1, sections 1 and 22). Trial counsel have stated in the affidavits accompanying the habeas petition that it was their understanding that no testimony would be taken while the jury was viewing the scene. They told Mr. Mann only that the jury would view the scene, and not that there would be testimony taken (Pet. App., Volume 1, section 1 and 2). This was Mr. Mann's understanding, as related to him by his counsel (Id.). It is evident in the record that the trial court assured counsel there would be no testimony taken. (Even if this were not clear, there are, at a minimum, questions which require an evidentiary hearing.) As the appendices to the habeas petition make clear, Mr. Mann never understood that he was waiving his right to be present at the taking of any testimony at the jury viewing. The record contains no express waiver of Mr. Mann's right to be present; there is only the bare statement of defense counsel, made in Mr. Mann's absence (in

chambers), which we now know was not relevant to the true issue.12/

During the in-chambers conference between counsel and the court, the court specifically noted that "the detective who will be testifying [at the crime scene] will simply point out the various areas and what that area pertains to and not give any further testimony of any kind" (ROA 1174)(emphasis added). The prosecutor qualified this specifically with the exception to location, to have the detective "point out where the tire plaster casts were made, the position of the body and that sort of thing."

The Court responded: "But no testimony beyond that" (ROA 1175)(emphasis added).

During the jury view, the prosecutor expanded the scope of the testimony taken to include testimony on various other matters extending far beyond his earlier explanation. Defense counsel objected, stating that the purpose of the view was to show the location and nothing further. The court allowed the questioning to continue (ROA 1604). After additional questioning, defense counsel again objected: "At this point, we would object as we previously objected, for eliciting testimony at the scene" (ROA 1609). The court overruled each of counsels' objection (ROA 1604, 1609, 1610).

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12. Further, during this time, Mr. Mann was in no mental condition to waive any right at all. As the medical records in the Appendix to the Petition for Writ of Habeas Corpus reflect, at the time of the in-chambers conference, Mr. Mann was heavily medicated with sinequan and librium to such an extent that his thinking was confused and distorted, and he was unable to make any knowing and intelligent waiver. (Pet. App., Volume 1, section 3; see also, ROA 2380, 2384-85 [Testimony by expert that Mr. Mann was heavily medicated and sedated throughout his stay at the jail pending trial and that Mr. Mann during this time suffered from psychotic depression]; see also ROA 2425-26 [testimony by defense counsel at penalty phase concerning the fact that Mr. Mann was medicated during pendency of proceedings].) (Again, on this issue, at a minimum, an evidentiary hearing was required.)

At the "viewings" the jury was paraded through five locations relating to the offense. At each scene, more and more damaging testimony was elicited (going far beyond the scope of the prosecutor's initial statements to the court regarding the scope of the viewings). Counsel, at each scene, objected. Counsel at each of the five scenes, declined to cross-examine -- because they could not. Counsel could not cross-examine because Mr. Mann was not there to provide information or assist in developing questions.

The record of what transpired at the five scenes to which the jury was paraded is included in pages 1599-1613 of the transcript. The transcript shows the extensive testimony taken from the lead investigative detective. No amount of artful re-writing can mirror the substantial constitutional violation shown by the transcript itself. Those pages (1599-1613) are therefore fully reproduced in Appendix C to this brief.

The jurors, judge, prosecutor, defense attorneys, witnesses, court reporter, victim's family, newspaper reporters, bailiffs and other court personnel all went to these five scenes (ROA 1599-1613). Mr. Mann was left behind (ROA 1601, 1603). Innumerable questions were asked. They visited, inter alia, the location of the decedent's home (ROA 1601), the area where she had last been observed (ROA 1603), the area where the bicycle was discovered (ROA 1604), the area where the body was discovered (ROA 1605), and even Mr. Mann's home (ROA 1612). At these locations, the lead detective described the scenes, the extent of searches conducted, where evidence was left, the conditions at each scene and how those conditions had changed (ROA 1599-1613). The detective first testified about the location of "the home of the victim's parents and the home where the victim was living on November fourth, 1980"

(ROA 1602). Next, the detective testified at "the place where Mrs. Underwood explained to you was the last place she saw Elisa Nelson" (ROA 1603). At the next scene, the detective described the location of the bicycle, showed the photograph to the jury, described its position in the brush, identified a photograph of the bicycle, showed the photograph to the jury, and explained that the area had been heavily overgrown and was now cleared (ROA 1604-05).

At the scene where the body was located, the detective pointed out the hole where, according to his testimony, the decedent's head had been situated, indicating that the hole was now full of leaves, and described the position of her body (ROA 1605-06). The detective also identified photographs taken the day the body was discovered, described the contents of the photographs, and explained where the photographer was standing (ROA 1607-08). The detective then described the differences in the scene from the way it appeared on the day the body was discovered (ROA 1609), and described the areas searched by the police, how the search was conducted, how the overgrowth present at the time complicated the search, and the locations of items of evidence collected by the searchers (1610-12).

At the final scene, Mr. Mann's home, the detective pointed out the home, explained how the home and truck were searched on November 8th, and pointed out a neighbor's home across the street (ROA 1612-13).

Defense objections to the detective's testimony on the basis that defense counsel were unable to conduct proper cross-examination were overruled (ROA 1609). Defense counsel conducted no cross-examination at any of the five scenes (ROA 1599-1613). During closing argument, the state repeatedly referred to the fact that the jury had been to all of the locations involved in the crime (ROA 2239, 2240, 2241,

2243, 2249, 2252, 2253).

Pages 1599-1613 of the record make it abundantly clear that Mr. Mann was denied the most essential of rights -- the right to be present during, and to confront one's accusers, at one's trial. The chief investigative detective's testimony at these scenes was critical. Mr. Mann, involuntarily, was absent.

STANDARD OF REVIEW

This is a habeas corpus proceeding in which no evidentiary hearing has been held and in which Mr. Mann's claims have been summarily dismissed. The allegations in the petition and the facts proffered in support thereof must therefore be taken as true for purposes of this appeal. Blackledge v. Allison, 431 U.S. 63 (1977). The issues presented in this appeal involve questions of federal constitutional law requiring independent review by this Court. Brewer v. Williams, 430 U.S. 387 (1977). This appeal also involves mixed questions of federal constitutional law and fact which require independent review. Cuyler v. Sullivan, 446 U.S. 335, 341-42 (1980).

This case has been set for en banc rehearing. Consistent with the common practice in the Circuit (see n.1, supra) the Court has not limited en banc review in this case. Mr. Mann's claims are therefore now before the full Court.

SUMMARY OF ARGUMENT

I. Mr. Mann was sentenced to death by a jury which was systematically misinformed by the prosecutor that the responsibility for the awesome capital sentencing that they were to perform was "not on [their] shoulders" and that they should shift their responsibility to the trial judge who would have special knowledge of information that was kept from them. The trial judge aggravated the pervasive harm caused by the prosecutor's comments, instructing the jurors throughout the

proceedings that the responsibility for sentencing was his and not their's. The comments came during the course of a trial involving grossly inflammatory prosecutorial exhortations that the jurors express unbridled "outrage" by sentencing Mr. Mann to death. The comments at issue were misleading, and were cured by no accurate instruction on the jury's proper role. Mr. Mann's death sentence is fundamentally unreliable and violative of the eighth and fourteenth amendments. Caldwell v. Mississippi. Because the State cannot demonstrate that the comments issue had "no effect" at sentencing, and because (as each judge of this Circuit who has passed on a Caldwell claim has agreed) there is no procedural bar to a determination of the merits of Mr. Mann's claim, Mr. Mann is entitled to habeas corpus relief.

II. Mr. Mann was denied the most fundamental of all rights -- the right to be present during critical proceedings in his capital trial at which substantial testimony was elicited on the merits of the case against him. Mr. Mann never waived that right, and the State cannot show that there is no reasonable possibility that Mr. Mann's presence would have had some effect on the events at the jury viewings from which Mr. Mann was involuntarily absent. Mr. Mann was denied his rights under the confrontation clause and under the sixth, eighth and fourteenth amendments to the United States Constitution. His claim is barred by no adequate and independent state law ground and, at a minimum, he is entitled to an evidentiary hearing in the district court on the basis of the allegations presented in his federal habeas petition.

III. Mr. Mann's sentence of death is based on "misinformation of constitutional magnitude" for that sentence was obtained on the basis of an unconstitutional prior

conviction. However, the Florida courts refused to allow Mr. Mann to prove his claim at a hearing by imposing a procedural bar that had been employed against no other litigant in the Florida courts and of which Mr. Mann could not have been reasonably apprised. Mr. Mann is entitled to a hearing in the federal district court on this claim.

IV. The State presented testimony at the penalty phase that Mr. Mann showed "no remorse" during his post-arrest, post-Miranda warnings, custody. Mr. Mann showed "no remorse" because he was exercising his right to remain silent. However, the "no remorse" evidence presented to the jury was used to rebut Mr. Mann's case in mitigation and to aggravate sentence, and was coupled with other improper prosecutorial comments in the prosecutor's exhortations that the jury recommend death. Such procedures violate Doyle v. Ohio, Wainwright v. Greenfield, and the fifth, sixth, eighth, and fourteenth amendments. No adequate and independent state law ground bars federal review of Mr. Mann's claim and, at a minimum, Mr. Mann is entitled to a district court hearing on this issue.

STATEMENT OF JURISDICTION

The statement of jurisdiction appearing at page 10 of Mr. Mann's initial panel brief is incorporated herein.

ARGUMENT

I.

SYSTEMATIC COMMENTS BY THE TRIAL JUDGE AND PROSECUTOR THROUGHOUT THE COURSE OF THE PROCEEDINGS RESULTING IN MR. MANN'S SENTENCE OF DEATH DIMINISHED THE JURORS' SENSE OF RESPONSIBILITY FOR THE CAPITAL SENTENCING TASK THAT THEY WERE TO PERFORM IN VIOLATION CALDWELL V. MISSISSIPPI AND THE EIGHTH AND FOURTEENTH AMENDMENTS .

A. PROSPECTIVE JURORS ENTER THE PROCESS IGNORANT OF THEIR ROLE AND DEPENDENT UPON PROPER INSTRUCTIONS.

The genius of the jury system enables us to employ lay persons unacquainted with legal processes in an essential factfinding role. For jurors to properly perform their job it is essential that they be accurately informed of their role.

Jurors are drawn from their ordinary pursuits into a venire. If selected, they are placed in an environment where every aspect of their surroundings suggests deference to the judge. The judge is specially clad in a black robe, elevated by the architecture of the courtroom, and elevated also by the conventions and protocol of our normal practice. There is a natural and proper tendency for the jurors to defer to the judge.

To grasp the essence of the central issue before the court, it is useful to mentally take the place of the lay person summoned from ordinary pursuits into this extraordinary setting, isolated from fellow citizens, dwelling in a domain where the judge has control. Jurors summoned and selected in capital cases will feel special pressure. The law ascribes for them an important role. Yet, they are ignorant of that role.

They do not know what lies in the realm of the jury and what responsibility rests with the judge. Jurors are told that they are to receive instructions on the

law from the judge. Under these circumstances, lay persons will probably listen closely as the lawyers and the judge tell about the jurors' job.

In a capital case, the jurors are placed "in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice . . . Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 2641-42 (1985). When we understand these factors, we can appreciate the powerful facts of this case.

B. THE JURORS WERE TOLD BY PROSECUTOR AND JUDGE THAT THEIR ROLE IN SENTENCING WAS NOT SIGNIFICANT.

Mr. Mann's Statement of the Case presented a detailed factual account of the numerous misleading statements provided by both the prosecutor and judge to his capital jury regarding the sentencing task that the law required them to perform. Throughout the proceedings the prosecutor told the jurors that their role at sentencing was essentially irrelevant, that their sentencing verdict was merely "advisory," that the sentencing decision was not on their "shoulders," and that the judge, who would hear more evidence, would decide the critical central question in this case: should Larry Mann live or die. As in Caldwell, the trial judge "not only failed to correct the prosecutor's remarks, but in fact openly agreed with them," 105 S. Ct. at 2645, by instructing the jury that their sentencing determination was in fact merely "advisory" and that responsibility for sentencing was his and his alone.

Not once did the judge or prosecutor inform the jurors of their proper role:12/ that their sentencing determination was a far cry from unimportant.13/

The prosecutor's misleading and inaccurate14/ theme did not cease when members of the jury were selected. In closing argument, the jurors heard an extraordinary statement from the prosecutor who apparently felt the need to isolate the jury from responsibility by again misinforming them of their proper role but also suggesting the superior knowledge of the judge. He said:

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12. Defense counsel, during voir dire, made one passing reference to the fact that the judge would give "great weight" to the jury's sentencing "recommendation." This isolated comment was by no means sufficient to undo the harm caused by the pervasive statements from the prosecutor and judge that the jury's "recommendation" was of little significance and that the sentencing task was not on their "shoulders." The Caldwell Court refuted the suggestion that even the prosecutor's own later statements "that the jury played an important role in the sentencing process" undid the harm caused by his earlier remark. 105 S. Ct. at 2645 n.7. The Court explained that "even if the prosecutor's later comments did leave the jury with [the] view that they had an important role to play, the prosecutor did not retract, or even undermine, his previous insistence that the jury's determination of the appropriateness of death would be reviewed by the appellate court to assure its correctness." Caldwell, 105 S. Ct. at 2645 n.7. That analysis applies with even stronger force to Mr. Mann's case. Here there was but a sole accurate reference to the jury's responsibility made by defense counsel at voir dire. Obviously, that passing reference was by no means sufficient to "retract" or "undermine" the persistent misleading and inaccurate statements of the prosecutor and the judge.

13. The "jury's role in an advisory sentencing process [in Florida] is critical." Adams v. Wainwright, 764 F.2d 1356, 1365 (11th Cir. 1985), cert. denied, 106 S. Ct. 834 (1986).

14. There can be little doubt that the statements at issue were misleading and inaccurate -- the jurors were told that their sentencing decision was of little [if any] importance while never being informed that that determination was "critical," Adams, 764 F.2d at 1356, or that the court would be bound by a verdict of life unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

> What I'm suggesting to you is that the ultimate responsibility for the imposition of the sentence rests with Judge Philip Federico. ... He's heard everything you have. He may have an opportunity to learn more before he imposes sentence.

(ROA 2439)(emphasis added).

The prosecutor's theme that jurors were not being dealt a full hand came up in the penalty phase argument in a statement which the panel decision found to be improper but insufficient to support a prosecutorial misconduct claim as an independent ground for reversal. The prosecutor stated:

> We did not show you everything that was available. We can only show you those items that were permitted into evidence, those items which were found to be more relevant than inflammatory.

(ROA 2430-31).

What is the purpose of this? One obvious explanation is that it is an attempt to signal the jury that the judge has special knowledge -- he knows things which cannot be told to the jurors, and he will learn more about things the jurors will never know. This "special knowledge of the judge" argument15/ is tailored to support the frequently repeated "not on your shoulders" refrain.16/

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15. These statements "created a severe danger that [the jurors] would defer to such an expert legal judgment [of the judge] in their choice of penalty." Drake v. Kemp, 762 F.2d 1449, 1460 (11th Cir. 1985)(en banc).

16. The prosecutor's statements should not be read in isolation. They were part of an overall effort to exhort a jury whose sense of responsibility had been systematically diminished into expressing their "outrage" on the basis of wholly improper factors: "This community cannot afford for this man to remain alive" (ROA 2435); "What we don't know, if this man is ever eligible for parole, is who the victim will be in 26 years possibly" (ROA 2430)[emphasis supplied]; "You sat through this entire trial . . . How would you describe him during the course of what can only

[footnote continued on next page]

The judge might have been able to correct the prosecutor's statements at the time they were made or in his instructions.17/ He did neither and, in fact, he denied a requested defense instruction which would have at least accurately stated the role of the jury (ROA 2357). Instead, the judge provided instructions which told the jury that the prosecutor was right. Cf. Caldwell, 105 S. Ct. at 2645. The judge emphasized the important role that he [the judge] played, while informing the jury

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16. [continued from previous page]

be described as emotionally heartrending testimony...? Did his expression change? Was he moved by emotion at all? Or did he appear to be cold and calculated? You look at him, and he shows no emotion at all..." (ROA 2271)[Mr. Mann was sedated during trial]; "There are other victims in this case, the parents of Elisa Vera Nelson who have never had the opportunity to stand in front of anyone and ask to have their daughter's life spared" (ROA 2439). These comments are but a few examples from a record as replete with prosecutorial misconduct as any can be. (For the Court's convenience, the penalty phase argument is reproduced in the Appendix to this brief.) Such comments (see also Initial [Panel] Brief of Appellant, pp. 37-40), when placed in the context of the prosecutor's Caldwell statements, show an even more egregious abrogation of the eighth and fourteenth amendments than that found to warrant relief in Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985), and Drake v. Kemp, supra, 762 F.2d 1449.

17. Compare the action of the trial judge in the case of McCorquodale v. Kemp, No. 87-8724 (11th Cir., September 20, 1987). There the Court explained that the eighth amendment had not been violated because proper and clear curative instructions were given. The McCorquodale trial judge began those instructions by stating that the prosecutor's argument was "highly improper." In contrast, the trial judge here enhanced and compounded the error.

that their role was of little significance.18/

In short, the jurors were told repeatedly that their role in sentencing was not significant. They received this misleading message over and over again, at each stage of the trial. They heard it from the prosecutor and from the judge. The special status of the judge was reinforced by the prosecutor's improper arguments that there were things not shown to the jurors and that the judge would get more information before he sentenced the defendant.

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18. Moreover, the sentencing instructions to the jury did not inform the jury of the impact of a verdict (and sentence) of life. Although there was, in the guilt/innocence phase, a passing reference to the maximum punishment for first degree murder (ROA 2313), this was not instructed on at the penalty phase where it related directly to the matter before the jury. The Florida Standard Jury Instructions now in force suggest that the trial judge refer to the alternative of "life imprisonment without the possibility of parole for 25 years" at the beginning of the penalty proceedings (see Florida Standard Jury Instructions in Criminal Cases, p. 77) and at the end of the penalty phase (id. at p. 80). In addition, the verdict form should carry the words "sentence of life imprisonment without possibility of parole for 25 years" (Id. at p. 82).

The trial judge did not give the jury the full explanation of the options at either of the two critical stages of the penalty phase, and the significant words which would remind the jury of the twenty-five year mandatory sentence were omitted from the jury verdict form.

As a consequence of this failure to adequately instruct on the alternative to a sentence of death, the danger of jury bias in favor of the death penalty was substantially enhanced. Cf. Beck v. Alabama, 447 U.S. 625 (1980). This also was an "error in instruction which makes it less likely that the jury will recommend a life sentence. . . ." Adams v. Wainwright, 764 F.2d 1356, 1364 (11th Cir. 1985). Considered in the context of Mr. Mann's Caldwell claim, this error also "generated a bias toward returning a death sentence. . . ." 105 S. Ct. at 2642.

C. THE PROCEEDINGS IN MR. MANN'S CASE VIOLATED CALDWELL V. MISSISSIPPI.

The gravamen of Mr. Mann's claim is based on the fact that the prosecutor and the judge substantially misled and misinformed the jury as to its proper role and function at sentencing. Under Florida's capital sentencing statute, the jury has th primary responsibility for sentencing. Although the jury's sentencing verdict is sometimes referred to as "advisory" or as a "recommendation," the jury's role at the sentencing phase of a capital trial is critical. See Adams v. Wainwright, 764 F.2d at 1365; Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Brookings v. State, 495 So. 2d 135 (Fla. 1986); Garcia v. State, 492 So. 2d 360 (Fla. 1986); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Dubois v. State, ___ So. 2d ___ (Fla. 1987); Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Fead v. State, No. 68,341 (Fla. September 3, 1987). Thus, any intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law.19/

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19. In fact, the judge's role is to serve as "buffer where the jury allows emotion to override the duty of a deliberate determination" of the appropriate sentence. Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976); see also Adams v. Wainwright, 804 So. 2d 1526 (11th Cir. 1986). While Florida requires the sentencing judge to independently weigh the aggravating and mitigating circumstances and render sentence, the jury's recommendation, which represents the judgment of the community, is entitled to great weight. McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982); Adams, 804 F.2d at 1529. The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So.2d at 910.

Both the prosecutor and judge led Mr. Mann's jury to believe that the judge was the sentencer, and that he was free to impose whatever sentence he wished, regardless of the jury's decision. At no point were the jurors correctly instructed as to Florida law-- they were never told that their sentencing decision was entitled to great weight, to extreme deference, or that in fact judge overrides of a jury's recommendation are seldom affirmed by the Florida Supreme Court.

In Caldwell, 105 S.Ct. 2633 (1985), the Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere," id., 105 S. Ct. at 2639, and that therefore prosecutorial arguments which tended to diminish the role and responsibility of a capital sentencing jury violated the eighth amendment. The prosecutor in Caldwell had argued that the jury's decision would be automatically reviewable by the Mississippi Supreme Court. However, because the prosecutor failed to also point out that the jury's decision would be viewed with a presumption of correctness, the Caldwell Court held that the jury was erroneously led to believe that the ultimate responsibility for the death sentence lay elsewhere. Because the "view of its role in the capital sentencing procedure" imparted to the jury by the improper and misleading argument was "fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" the Court vacated Caldwell's death sentence. Caldwell, 105 S.Ct. at 2645, quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

The constitutional vice of the misinformation condemned by the Caldwell Court is

not only the substantial unreliability it injects into the capital sentencing proceeding, but also the danger of bias in favor of the death penalty which such "state-induced suggestions that the sentencing jury may shift its sense of responsibility" creates. Id. at 2640.

A jury which is unconvinced that death is the appropriate punishment might nevertheless vote to impose death as an expression of its "extreme disapproval of the defendant's acts" if it holds the mistaken belief that its deliberate error will be corrected by the 'ultimate' sentencer, and is thus more likely to impose death regardless of the presence of circumstances calling for a lesser sentence. See Caldwell, 105 S.Ct. at 2641. Moreover, a jury "confronted with the truly awesome responsibility of decreeing death for a fellow human," McGautha v. California, 402 U.S. 183, 208 (1971), might find a diminution of its role and responsibility for sentencing attractive. Caldwell, 105 S.Ct. at 2641-42. As the Caldwell Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize its role. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Id. at 2641-42. In Mr. Mann's case, given the emotional nature of the offense, and especially considering the Caldwell statements alongside the prosecutor's inflammatory exhortations (see n.16, supra), the evil condemned in Caldwell is even more apparent.

As in Caldwell the prosecutor's remarks in Mr. Mann's case "were quite focused, unambiguous, and strong." 105 S. Ct. at 2645. But the prosecutor's comments here went a step further -- they were much more systematic than those in Caldwell. Moreover, the prosecutor's efforts to diminish the jury's sense of responsibility in Mr. Mann's case were given the imprimatur of the court through its instructions. Cf. Caldwell, 105 S. Ct. at 2645 ("The trial judge in this case not only failed to correct the prosecutor's remarks, but in fact openly agreed with them..."); McCorquodale v. Kemp, supra, slip op. at 7. Here, in fact, the trial judge himself presented the jury with inaccurate information -- the error is thus even more egregious than that in Caldwell:

> [B]ecause . . . the trial judge . . . made the misleading statements in this case, representing them to be an accurate description of the jury's responsibility, the jury was even more likely to have believed that its recommended sentence would have no effect and to have minimized its role than the jury in Caldwell.

Adams v. Wainwright, 804 F.2d 1526, 1531 (11th Cir. 1986).

Caldwell teaches that, given comments such as those provided by the judge and prosecutor to Mr. Mann's capital jury, the State must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. Id. at 2646. The State simply cannot carry that burden here. In Mr. Mann's case, a substantial case in mitigation was presented. Moreover, mitigating factors were found by the sentencing

court. Mr. Mann's case thus falls "within the area of deference to the jury's recommended sentence which makes the need for reliability in that recommended sentence of critical importance." Adams, 804 F.2d at 1533. Put another way, had the jurors not been misinformed, and had they recommended life, that recommendation could not have been overridden, for a "reasonable basis" for such a life recommendation existed in this case. See, e.g., Ferry v. State, supra Mr. Mann's sentence of death therefore "does not meet the standard of reliability that the Eighth Amendment requires." Caldwell, 105 S. Ct. at 2646.

D. THIS CIRCUIT'S APPLICATION OF CALDWELL PRINCIPLES TO FLORIDA DEATH CASES: THE ADAMS CASE.

Following the decision in Caldwell, this Circuit addressed the case of a Florida jury which received instructions which may have diminished its sense of responsibility. In November, 1986, Chief Judge Roney and Judges Fay and Johnson decided Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), and held that Caldwell v. Mississippi applied to Florida capital cases for, in Florida,

> [T]he jury's recommendation...is entitled to great weight. McCampbell v. State, 421 So.2nd 1072, 1075 (Fla. 1982) (per curiam), and may be rejected by the trial judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (per curiam). This limitation on the judge's exercise of the jury override provides a "crucial protection" for the defendant. Dobbert v. Florida, 432 U.S. 282, 295 (1977).

Adams, 804 F.2d at 1529 (emphasis supplied).

The Adams panel examined the facts and compared them to Caldwell. In Caldwell the comments were made by a prosecutor in closing argument, and endorsed by the judge. Adams involved statements made by a judge in jury selection. E.g., Adams, 804 F.2d at 1528 ("The ultimate responsibility . . . is not on your shoulders.").

Adams held that the judge's statements violated Caldwell. Adams, 804 F.2d at 1529.

The Adams statements have direct parallels in Mann v. Dugger. Both the Adams and Mann juries were told that:

* the jury verdict was just a recommendation,

* that the judge was not bound by their recommendation,

* that the decision was not on the jurors' "shoulders," and

* that the jurors' role was merely advisory (the Adams jurors were told they were "merely" advisory; the Mann jurors were told that they acted in "an advisory capacity only.");

* moreover, no curative instructions were given in either Adams or Mann.

These parallels between Adams--the settled law of the Circuit--and Mann are so striking that the argument could well be ended here.

E. AN ELEVENTH CIRCUIT PANEL DRAWS THE LINE: THE HARICH DECISION.

After Adams, this Court's next Caldwell case was Harich v. Wainwright, 813 F.2d 1082 (11th Cir. 1987), which is also before the Court for en banc briefing and argument. In Harich, the panel (Fay, Johnson and Clark) held that a statement by the prosecutor and certain statements by the trial judge did not mislead the jury. During voir dire, the prosecutor stated that in the sentencing phase the "court pronounces whatever sentence it sees fit". The trial court then made statements at guilt/innocence to the effect that sentencing was the judge's job. E.g., Harich, 813 F.2d at 1099 ("the penalty is for the court to decide. You are not responsible for the penalty in any way because of your verdict...").

The Harich panel concluded that the statements at issue did not create the

"intolerable danger" that an advisory jury was allowed to minimize its proper role and that the "seriousness of the jury's advisory role was adequately communicated. ..." Harich, 813 F.2d at 1101.

F. A SUGGESTED ANALYTIC FRAMEWORK.

Mann is safely inside the principles established in Caldwell and Adams. We go further in analysis because we are bothered by the panel decision in Harich where, though the comments at issue are nowhere near as strong as those in Mann, they still seem to go well beyond Caldwell. We therefore suggest a framework for analysis of Caldwell claims.

We first return to the dynamics of the venire--the reality of a lay person's confusion when arriving at the courthouse to learn that s/he will serve on a capital case. Our analysis looks to that juror and the likelihood that the juror's sense of responsibility may be diminished. We suggest that the Court sort through these cases by addressing six questions: (1) Who made the statements? (2) When were the statements made? (3) How often were the statements repeated? (4) Were the statements true or false? (5) What is the substance of the statements made? (6) What curative instructions were given?

Each of these six approaches is examined below. We will show that under any method of analysis, Mann has far more compelling Caldwell facts than any other case to date.

1. Who made the statements?

We know from Caldwell that a diminishing statement only from the prosecutor (with a judicial endorsement) is a sufficient basis for constitutional attack. In Adams, this Court noted that the power of a trial judge to mislead a jury may be even

greater. 804 F.2d at 1532. In Mr. Mann's case, both judge and prosecutor persistently made statements which undermined jury responsibility.

Further, in Mr. Mann's case, the judge refused to give the jury a requested instruction (ROA 363) which would have helped correct the misleading statements.

2. When were the statements made?

In Caldwell, the jury heard the offending statement only in one episode at closing argument. In Adams, the offending statements were made throughout voir dire In Mr. Mann's case, the theme of the jury's diminished role in sentencing began at voir dire and was drummed in over and over again at each stage of the trial.

The litany persisted from voir dire into the guilt/innocence phase and then int all steps of the sentencing phase. From the time the judge announced that the jury would go on to sentencing -- in his preliminary penalty phase instructions -- throug the prosecutor's final argument and into final sentencing instructions, the jurors were told that they had no real responsibility for sentencing. That responsibility rested not on their "shoulders" but with the judge, who would "learn" more.

Significantly, in this case, the prosecutor began with the idea of the jurors' diminished role very early in the voir dire. More significantly, he returned to thi topic at the places where lawyers normally place their most important points -- the end of his closing arguments at both guilt/innocence and sentencing.

3. How often were the statements repeated?

In Caldwell, there was a single episode. In this case, it is actually very har to count the number of times that the prosecutor and judge made statements which diminished the jurors' responsibility for their sentencing task. Part of the time the prosecutor built up the jurors' role at guilt/innocence ("No one second guesses

you") as a contrast to the "not on your shoulders" theme relating to the jurors' sentencing function. Even when the prosecutor used seemingly nonprovocative terms -- "advisory" and "recommendation" -- those terms were significantly tainted by the prosecutor's "not on your shoulders" definition. A reading of the Statement of the Case or of the excerpts from the trial transcript appended to this brief undeniably demonstrates the highly repetitious, systematic nature of these comments and instructions.

4. Were the statements true or false?

In Caldwell, the prosecutor's references to automatic appellate review were, in a technical sense, true, but they did not tell the full story. The Caldwell jurors were told of the automatic appellate review but were not told that their verdict was entitled to a presumption of correctness. The statements were misleading.

If statements are false, there is obviously even greater danger. Here, as in Adams, the jurors were told, multiple times, that the sentencing decision rested not on their "shoulders". At other times, it was made clear that sentencing was "solely" with the judge or that the judge was not bound by the "recommendation." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1976), settled Florida law. Under Tedder, a judge may reject a jury's recommendation only if the facts are "so clear and convincing that virtually no reasonable person could differ." The chasm between the Tedder standard and the statements made to this jury is shockingly wide.

5. What is the substance of the statements made?20/

Our analysis of the substance of the statements compares the statements made in Caldwell, Adams, Harich and Mann and looks at two major types of statements: First, statements which indicate that the jury has only a limited or diminished role in sentencing. Second, statements which tell the jury that the court's role is paramount. In this case, there is a third category, closely related to the second, consisting of statements which tell the jury that the judge has special knowledge. These categories of substantive statements are reviewed below.

a. Statements which indicate that the jury only has a limited role.

In order to develop some understanding of this type of statement we place the statements in a hierarchy ranging from the least damaging to the most damaging:

* Jurors told that their decision is "advisory" or that their verdict is a "recommendation";

* Jurors told that jury role is "solely" or "merely" advisory;

* Jurors told that sentencing is not a jury decision or that responsibility is not theirs;

* Jurors told that the decision for sentencing is not on jurors' "shoulders".

As discussed below, cases which merit reversal will have some of those statements. In Mann, the statements made by the prosecutor and judge range through

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20. This element of analysis is obviously the most critical. If the statements are not of the type that diminish the jury's responsibility, they may be made by an authoritative figure, repeated often at every stage of the trial and even be false without raising a Caldwell claim.

the hierarchy. Moreover, the Mann case is a special case because, even when the prosecutor told the jury that its role in sentencing was to give an "advisory opinion" or "recommendation," he immediately provided a distinct content to those words by sounding the "not on your shoulders" theme.

b. Comments which convey the dominance of the judge's position.

In this hierarchy are comments which tell the jury to defer to judicial authority. This is a somewhat indirect but extremely powerful way to diminish jurors' sense of responsibility. This analysis moves from those comments which seem to have least impact to those which have greater impact:

* Decision on sentence will be automatically reviewed;
* Final decision is with the judge;
* Responsibility is with the judge;
* Court is not bound by jury verdict on sentencing;
* Judge can disregard jury verdict;
* Decision on sentence rests solely on judge.

A third type of very powerful comment, present in Mann, is that the judge has special knowledge or special access to knowledge. A hierarchy there might be as follows:

* At the sentencing phase, prosecutors argue:

  > We can show you only those items permitted into evidence, those items which were found to be more relevant than inflammatory.

* At the sentencing phase, prosecutors argue:

  > The judge has heard everything you have. He may have an opportunity to learn more before he imposes sentence.

6. What curative instructions were given?

We need not linger on this question. There were no curative instructions in Mr. Mann's case. Cf. McCorquodale v. Kemp, supra.

G. APPLYING THE ANALYSIS TO THE FACTS OF THE CASES.

If these methods of analysis appear reasonable based on the tendency of the various statements to lessen the jurors' sense of responsibility, then we can use these to place the significant cases into some comprehensible order. For purposes of economy, we now deal with Caldwell, Adams, Harich and Mann. We return to the six questions, and attempt to weigh the cases:

1. Who made the statements?

Prosecutor: Caldwell.

Judge: Adams.

Prosecutor and Judge: Harich and Mann.

2. When were statements made?

Voir Dire: Mann, Adams, Harich.

Guilt/Innocence Phase, Instructions: Harich and Mann.

Guilt/Innocence Closing Arguments: Mann.

Sentencing Phase, Closing Argument: Mann and Caldwell.

Sentencing Phase, Preliminary Instructions: Mann and Harich.

Sentencing Phase, Final Instructions: Mann and Harich.

Turning this around to look at the stages of each case where statements were made, we see that, from this analytical view, Caldwell and Adams present less offensive factual patterns than Mann or even Harich:

Caldwell: Closing argument.

Adams: Voir dire.

Harich: Voir dire, instructions at the guilt/innocence phase, preliminary instructions at sentencing phase, final instructions at sentencing phase.

Mann: Voir dire, guilt/innocence phase instructions, guilt/innocence phase closing argument, sentencing phase closing argument, sentencing phase preliminary instructions, sentencing phase final instructions.

The offensive statements were pervasive in the trial of Larry Mann.

A more graphic way of looking at the first two methods of analysis (who made the statements and when were they made) is offered in the following chart:

COMPARISON OF FACTS:
ELEVENTH CIRCUIT CASES INVOLVING CALDWELL CLAIMS21/

Stages of the Trial	Caldwell	Adams	Harich	Mann
Preliminary: Voir Dire		[illegible]	P	P
Guilt/Innocence: Closing Argument				P
Final instructions			J	J
Penalty Phase:				
Closing Argument	P			P
Preliminary Instructions		J	J	J
Final Instructions		J	J	J

3. How often were such statements made?

In Caldwell, there was a single point repeated within a few minutes: "Your job is reviewable." 105 S.Ct. at 2637, 2638.

In Adams, the judge said, eleven times at voir dire, "the ultimate responsibility for what this man gets is not on your shoulders. It's on my shoulders. You are merely an advisory group to me in Phase Two." 804 F.2d at 1528.

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21. Legend: P = Prosecutor's comments where the court does not give curative instruction. J = Comments or instruction by the judge.

In Harich, the prosecutor made a single statement at voir dire, the judge made "several similar statements during the guilt/innocence phase," and there were statements made by the judge at both the beginning and end of the penalty phase. 813 F.2d at 1098-99.

In Mann, the prosecutor made multiple statements at voir dire, an offensive comment at the end of his guilt/innocence argument, and returned to the theme in the very last passage of his sentencing phase closing argument. Diminishing the statements were included in the judge's guilt/innocence instructions, the judge's preliminary instructions in the penalty phase, and the final instructions in the penalty phase.

If we analyze the stages of the case where there are statements diminishing the jurors' role occur, it is clear that the facts of Mann go further than any other case yet before this Court, and significantly, go very far beyond the conduct found improper in Caldwell.

4. Were the statements true or false?

Virtually all the comments made in Caldwell, Adams, Harich and Mann are misleading to one degree or another.22/ Therefore, we turn to the final method of analysis which is the suggested hierarchy of substantive statements.

5. What statements were made?

Earlier, we suggested two hierarchies and have ranked the statements from those we believe to be least misleading to those most misleading. We now repeat those hierarchies and attempt to match the cases to them:

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22. It is also important to remember that the Caldwell statements in Mr. Mann's case came in the context of grossly improper and inflammatory prosecutorial arguments. See n.16, supra.

A.

STATEMENTS CONCERNING ROLE OF THE JURY IN SENTENCING

	Caldwell	Adams	Harich	Mann
A. Jurors told that their decision is "advisory" or that their verdict is a "recommendation";			X	X
B. Jurors told that their verdict is "simply a recommendation" or that jury role is "solely" or "merely" advisory;				X
C. Jurors told that sentencing is not a jury decision; or that they are not responsible; or that they do not "impose" the death penalty;		X	X	X
D. Jurors told that the decision for sentencing is not on their "conscience" or is not on their "shoulders".		X		X

Note that there are no comments or instructions of this type in Caldwell. Again, the facts in Larry Mann's case show comments ranging from the least offensive to the most offensive and, quite often, the prosecutor in the Mann case attempted to put a heavily prejudicial definition on even the least offensive phrases.

Chart B lists those statements relating to judicial roles, statements which emphasize the responsibility of others and which at least indirectly diminish the jurors' sense of responsibility:

B.

STATEMENTS CONCERNING THE ROLE OF THE COURTS IN SENTENCING

	Caldwell	Adams	Harich	Mann
A. Decision on sentence will be automatically reviewed.	X			
B. Final or "ultimate" decision is with the judge; final decision "solely" with the judge.			X	X
C. Responsibility is with the judge.		X	X	X
D. Judge has special knowledge.				X
E. Judge may learn something jurors will not know before sentencing.		X		X
F. Court is not bound by jury verdict on sentencing; court pronounces whatever sentence it sees fit; judge can disregard jury verdict.		X	X	X
G. Decision on sentence rests solely on judge's "shoulders".		X		X

If our analysis is correct, the facts of Caldwell are less offensive than those of the other cases.

What is not apparent in any of these charts is the extent to which the jury diminishing comments pervade the Mann record. Particularly difficult to place on these charts is the point already made but important enough to deserve repetition:

The prosecutor started very early at voir dire with the "not on your shoulders" theme and carried it through at every nonevidentiary phase of the trial. The placement at the end of both his jury arguments demonstrates the extent to which this idea of diminishment was a critical theme.

6. Were curative instructions given?

In none of the four cases were curative instructions given. In Mr. Mann's case not only did the judge fail to cure the harm, but his instructions enhanced it.

H. MR. MANN'S CALDWELL v. MISSISSIPPI CLAIM IS NOT PROCEDURALLY BARRED.

The discussion presented above demonstrates that Mr. Mann is entitled to habeas corpus relief. The Respondent, however, has argued that Mr. Mann's claim should not be heard by asserting that the claim is procedurally barred. However, no procedural bar precludes consideration of the merits of Mr. Mann's claim.

1. Cause and Prejudice

No adequate and independent state procedural ground exists barring this federal court's review of Mr. Mann's claim. See Section 2, infra.23/ However, even if such a bar existed, ample "cause" and "prejudice" is obvious in this case. It is black letter habeas law that the novelty of a federal constitutional claim whose legal basis could not have reasonably been known to a petitioner in the state courts is sufficient to establish "cause." See Reed v. Ross, 468 U.S. 1, 6 (1984). Caldwell

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23. It would be redundant to restate here all of the reasons why Mr. Mann's claim is obviously before the Court on the merits. The grounds discussed with regard to other issues presented in latter portions of this brief apply with equal force to Mr. Mann's Caldwell claim. In the interests of brevity, those grounds, as well as the reasons discussed in Mr. Mann's initial and reply briefs, and in the panel opinion, 817 F.2d 1471, are not detailed, although incorporated, herein.

v. Mississippi did not exist at the time of Mr. Mann's trial, sentencing and direct appeals.

Every judge of this circuit who has passed on a Caldwell claim has recognized the claim's novelty and agreed that federal review is not barred by the doctrine of procedural default. See, e.g., Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986)(Roney, Fay and Johnson), modified in part sub. nom. Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987).

The panel decision in this case was before Judges Fay, Johnson and Clark. Mann v. Dugger, 817 F.2d 1471, 1474 (11th Cir. 1987)(opinion of Johnson, J.); id. at 1487 (Clark, J., concurring); id. at 1485 (Fay, J., dissenting) ("[T]his claim is not procedurally barred because Caldwell was decided after Mann's second direct appeal. ..."). That same panel addressed Harich v. Wainwright, 813 F.2d 1082 (11th Cir. 1987), and, on the procedural default issue, reached the same result. In McCorquodale v. Kemp, No. 87-8724 (11th Cir., September 20, 1987), an entirely different panel (Godbold, Kravitch and Hatchett) also recognized Caldwell's novelty.

This Circuit has recognized that "no one was raising [Caldwell claims]" during the period of Mr. Mann's direct appeals. Adams v. Dugger, 816 F.2d at 1500. The claim was not "reasonably available" prior to Caldwell. Adams at 1500. "[T]he state of the case law prior to Caldwell gave no indication that [statements diminishing the jury's sense of responsibility] might violate the Eighth Amendment." McCorquodale, slip op. at 4.

Accordingly, Caldwell's novelty amply demonstrates "cause." The "prejudice" to Mr. Mann was substantial -- as is demonstrated by the discussion in the preceding sections of this brief -- for the misleading statements made to the jury at Mr.

Mann's sentencing resulted in a sentencing decision that "does not meet the standard of reliability that the Eighth Amendment requires." Caldwell, 105 S. Ct. at 2646.

2. The lack of an adequate and independent state law ground in this case makes the procedural default doctrine inapplicable.

If, under state law, no procedural bar is available, then no procedural default can be imposed by the federal court. See Spencer v. Kemp, 781 F.2d 1458, 1463 (11th Cir. 1986) (en banc). Moreover, the sporadic or inconsistent application of procedural bars itself defeats any adequacy and independence that may be ascribed to such rules. Spencer, supra, at 1470; Ake v. Oklahoma, 470 U.S. 68, 74-75 (1985). Each of those reasons is sufficient to show that in Mr. Mann's case no adequate and independent state law procedural ground exists to bar this Court's review.

As this Court explained in Adams v. Dugger, Caldwell meets all of the criteria established in Witt v. State, 387 So. 2d 922, 929 (Fla.), cert. denied, 449 U.S. 1067 (1980), as sufficient to mandate merits review of the claim in a Florida post-conviction forum. Caldwell "emanated" from the United States Supreme Court. See Witt, supra, 387 So.2d at 929. Caldwell involved the most "fundamental" of eighth amendment concerns: that a defendant not be sentenced to die at a "substantially unreliable" proceeding because of "state-induced suggestions that the sentencing jury may shift its sense of responsibility." Caldwell, 105 S.Ct. at 2640. Obviously, Caldwell's fundamental eighth amendment concerns demonstrate that the Caldwell decision is retroactive. See Witt, 387 So.2d at 929. This Circuit has applied it retroactively. Adams, supra

Similarly, Caldwell claims are classic examples of issues which must be determined on the merits pursuant to Florida's "fundamental error" analysis, as this

Court recognized in Adams v. Dugger, supra, 816 F.2d at 1497. The Adams analysis applies fully to Mr. Mann's claim for Caldwell involves the most fundamental of eighth amendment principles.

3. The interests of justice.

As discussed above, Mr. Mann was denied the most basic eighth amendment constitutional right -- the right to an individualized sentencing determination. The jury which sentenced Mr. Mann was misled and misinformed. The jurors likely based their sentencing decision on factors having nothing to do with the character of the offender or circumstances of the offense. On that basis, Mr. Mann has been sentenced to die. There can be little doubt that the prosecutor's and trial court's misleading statements "serve[d] to pervert the jury's deliberations concerning the ultimate question whether in fact [Larry Mann should be sentenced to die]." Smith v. Murray, supra, at 2668 (emphasis in original). Given such circumstances, no procedural bar can be applied to Mr. Mann's claim.

I. CONCLUSION

Mr. Mann has presented a substantial Caldwell v. Mississippi claim which is before the Court on the merits. The State cannot show that the Caldwell errors in this case had "no effect" on the jury's sentencing determination. Mr. Mann is entitled to the habeas corpus relief he seeks.

II

MR. MANN WAS DENIED HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WHEN THE TRIAL COURT CONDUCTED CRITICAL PROCEEDINGS AND ALLOWED IMPORTANT TESTIMONY TO BE TAKEN WHILE MR. MANN WAS INVOLUNTARILY ABSENT, AND THE DISTRICT COURT ERRED IN FAILING TO CONDUCT AN EVIDENTIARY HEARING ON THIS CLAIM.

During the course of Mr. Mann's capital trial, the jury was shepherded to various locations relating to the offense. The judge, prosecutor, defense attorneys, witnesses, court reporter, bailiffs and other court personnel, newspaper reporters, spectators, victim's family, and, of course, the jurors, were all at these scenes. Mr. Mann was left behind. Testimony was taken. Photographs were shown to the jury and described. The lead detective described the locations, the evidence, and law enforcement's investigative efforts. The detective then gave his views on, inter alia, where evidence was left, how it was found, the accounts of witnesses, the conditions at the scene, how the conditions had changed, and how he and other law enforcement personnel invested great efforts into "combing" the scene for evidence. These "jury viewings" were the core of the State's case, as the prosecutor's repeated reminders during summation made clear (ROA 2239, 2240, 2241, 2243, 2249, 2252, 2253). But Mr. Mann was not there.

Mr. Mann will not repeat herein all the reasons why the "jury view" proceedings in this case were flatly unconstitutional. Those grounds are detailed in his Initial [Panel] Brief (pp. 11-18) and in his petition for panel rehearing (pp. 1-12). It is, however, indisputable that contrary to principles which are at the very core of the confrontation clause, Mr. Mann was not present when substantial testimony was elicited against him. This was inexcusable: Mr. Mann was not disruptive; he never

waived his right to presence in open court; his attorneys never informed him that he would be waiving his right to be present during the taking of testimony (the affidavits appended to the habeas petition make this undeniably clear); the attorneys themselves were then misled by the court's assertions that no testimony would be taken when they waived his right to presence at an in-chambers conference conducted in Mr. Mann's absence.24/ To the extent that there exists any question on these issues, an evidentiary hearing is required. Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984); see also Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983).

What happened at the view was a far cry from what the court represented to counsel and what counsel told Mr. Mann. Extensive testimony was elicited, over counsel's objections, regarding numerous aspects of the case. Nevertheless, the panel denied relief by relying on the due process harmless error analysis of a pre-incorporation case, Snyder v. Massachusetts, 291 U.S. 97 (1934), which had nothing to do with the essential values protected by the sixth amendment's confrontation clause and the eighth amendment's concerns for heightened reliability. See Mann v. Dugger, 817 F.2d 1471, 1476 (11th Cir. 1987). Snyder, in fact, did not involve the testimony of a witness (the prosecutor there pointed out the scene) during a critical stage of trial.

Here, Mr. Mann was denied the most central of constitutional rights -- the right to be at his trial. It is, after all, the defendant's right to suggest whether a witness should be examined or not, what questions should be asked, what defenses should be explored and developed.

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24. At the time, Mr. Mann was heavily sedated and medicated and would have been unable to form a valid waiver of any right.

Moreover, a petitioner is entitled to habeas relief if there is "any reasonable possibility" of prejudice resulting from his absence. Proffitt v. Wainwright, 685 F.2d 1227, 1260 (11th Cir. 1982), modified, 706 F.2d 311 (11th Cir. 1983); Estes v. United States, 335 F.2d 609, 618 (5th Cir. 1964). The panel failed to see that the record of the testimony taken at the five locations to which the jury was shepherded (ROA 1600-13) showed exactly such a possibility. That record is rife with objections and statements from defense counsel indicating to the court that they could not fairly cross-examine the witness. As the group travelled to each location, more damaging and critical testimony was elicited. Counsel, at each point, declined to cross-examine -- they could not because their client was not there to provide information or assist in developing questions.25/

It must be remembered that the theory of defense at guilt-innocence was that a reasonable doubt existed because law enforcement did not properly investigate the case. Thus, in court, counsel challenged the State's "scientific" evidence as well as the inadequate investigation of the "lead" detective who testified at the jury viewings. His testimony was central. He should have been cross-examined at the scene, as was Mr. Mann's right. Without the needed information from the absent defendant, the detective's account was left unassailed.

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25. The attorneys, like Mr. Mann, had been misled. The court had indicated earlier that no testimony would be taken [ROA 1175]. Thus, counsel were placed in an untenable position -- they did not consult with Mr. Mann ahead of time because they believed testimony would not be taken at the "viewings" [cf. Appendices 1 and 2 to Petition for Writ of Habeas Corpus (affidavits of former counsel)], and they did not have Mr. Mann to consult with once it became obvious that testimony was being elicited.

This case, therefore, is in all pertinent respects no different than Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), modified, 706 F.2d 311 (1983). There, the defendant was involuntarily absent from a hearing held after the jury had rendered its advisory sentence at which a doctor presented testimony concerning psychiatric reports that had been presented to the court. 685 F.2d at 1256-58. The State argued that Proffitt's absence was harmless. This Court, however, refused to "engage in speculation as to the possibility that [Proffitt's] presence would have made a difference." Proffitt, 685 F.2d at 1260, citing Davis v. Alaska, 415 U.S. 308, 317 (1974). Rather, the court explained that because Proffitt could have provided information to counsel which could have been used to impeach the doctor, the defendant's absence could not be deemed harmless even though it had never been shown that the information would have changed the doctor's opinion. Proffitt, 685 F.2d at 1260-61.

Similarly, here, Mr. Mann could have provided information to counsel respecting the scene, its condition at the time of the offense, his home, the alleged location of physical evidence, the alleged "changes", and the other matters testified to by the detective which could have been used to challenge and impeach that witness's testimony.26/ Mr. Mann could suggest nothing to counsel, and counsel could not consult

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26. Had Mr. Mann been there, had counsel been able to consult with their client, the attorneys could well have cross-examined the detective when it counted. They could have challenged his recollection; they could have challenged his description of the alleged changes in the scene; they could have challenged his version of the events. Through the information that Mr. Mann could have provided, numerous questions could have been posed concerning the eyeglasses, the pole, the bicycle, the dirt road, the decedent's body, the "thick brush," the bushes, the "head in the hole," the tire tracks, the "galvanized pipe," the "concrete," County Road 39,
[footnote continued on next page]

with him, because he was not there. (Counsel obviously did not prepare to confront the witness in Mr. Mann's absence -- e.g., by talking to Mr. Mann before the viewing -- because they had been told that no testimony would be elicited. Cf. Proffitt at 1260 [attorney did not have information with which to impeach doctor because client was not there to provide it.]) The detective's account, like the doctor's in Proffitt, was left unimpeached. As this Court has explained, even if the information which Mr. Mann could have provided would not have changed the [detective] witness's account, Proffitt, 685 F.2d at 1260-61, Mr. Mann's rights were violated because his absence denied him the right to provide information which could have been used to impeach the witness's account. Id. (This is especially true in a case such as this where the theory of defense was founded on challenging law enforcement's investigative efforts.)

A. THE NEED FOR A HEARING.

At the very least, under Proffitt, Mr. Mann should be allowed the opportunity, at a hearing, to establish the "reasonable possibility" that his absence affected his right to cross-examine and impeach the witness's on-the-scene account. See, e.g., Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984); see also United States v. Stratton, 649 F.2d 1066, 1081 (5th Cir. Unit A 1981) (absence of defendant at prosecutor's summation at co-defendant's trial was harmful error).

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26. [continued from previous page]

Highway 19, Nineteenth Street, Seventeenth Street, Nebraska Avenue, the "sandy area," the "grassed-in" area, the "leaved-in" area, the truck in the garage, the neighbor, the "hands and knees" search, etc. To the extent that these matters seem obscure, counsel refers the court to Appendix C, infra, which shows their critical importance.

No evidentiary hearing has ever been held on this claim either in the state courts or the federal district court. Consequently, Mr. Mann's allegations, including the fact that his absence "harmed" and "prejudiced" him, must be taken as true for purposes of this Court's appellate review. See Blackledge v. Allison, 431 U.S. 63 (1977). Contrary to Allison, the panel placed on Mr. Mann the burden of showing prejudice before any evidentiary hearing was held. Mr. Mann could and would show prejudice. Yet, that showing could only be made at a hearing -- where former defense counsel, Mr. Mann, and other witnesses could be called to testify. Mr. Mann's allegations entitled him to relief. To the extent that the record was unclear or insufficient on the question of "prejudice", it was insufficient because no hearing had ever been held. A hearing, therefore, was warranted. See Blackledge v. Allison, supra; Hall v. Wainwright, supra; Townsend v. Sain, 372 U.S. 293 (1963); Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983).

A "reasonable possibility" that Mr. Mann's absence was harmful, Proffitt, supra, does exist in this case. An evidentiary hearing is necessary for Mr. Mann to prove, through the testimony of former counsel, Mr. Mann, and other witnesses, the grave harm caused by his absence.

B. MR. MANN'S CLAIM IS NOT PROCEDURALLY BARRED.[27]

The Florida Supreme Court did not rule that Mr. Mann's claim is procedurally barred. Rather, the Florida Supreme Court's opinion denying Mr. Mann's request for post-conviction relief spoke only in terms of merits review:

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27. In addition to the analysis presented below, Mr. Mann relies on the arguments present in his initial and reply briefs to the panel and on the analysis contained in the panel opinions of Judges Johnson and Clark.

> We see no need or benefit in discussing in detail the remainder of Mann's claims in his 3.850 motion. . .
>
> It is obvious and clear that present counsel's complaint of trial counsel's handling of the trial would not have affected the truth-seeking process, the evaluation of the evidence, the proper application of the law, or the outcome of the case. A comparison of the original trial record clearly and conclusively refutes any claim that there was any constitutional infirmity in the trial. The same is true of the appellate process. Although Mann urges vehemently numerous grounds for habeas corpus relief, each is either refuted or is insufficient for relief."
>
> In conclusion, we are satisfied that this was a well and conscientiously tried case by counsel, the trial judge, and the jury. Appellate counsel and this Court have zealously fulfilled their review responsibilities. Accordingly, we affirm the order of the trial judge denying relief under the 3.850 motion. We deny the application for habeas corpus. We deny the application for a stay of execution.

Mann v. State, 482 So.2d at 1362 (emphasis supplied). The presence issue had been presented as an independent claim in both the Rule 3.850 motion and in the state-court petition for a writ of habeas corpus. As the above excerpt demonstrates, a fair reading of the Florida Supreme Court's opinion can lead to only one conclusion: the Court ruled on the merits. Consequently, there exists no "adequate and independent state ground" precluding this Court's review. Michigan v. Long, 463 U.S. 1032 (1983).

The procedural default rule of Wainwright v. Sykes is based on the understanding that "considerations of comity" require that federal courts give the respect that is due to an "adequate and independent state ground" on which a state court has relied to reject a federal claim. 433 U.S. 72, 78-79, 84 (1977), quoting Francis v. Henderson, 425 U.S. 536, 538-39 (1976). Yet, when the state courts fail to expressly indicate that a federal constitutional claim is "barred by some state procedural

rule, a federal court implies no disrespect for the State by entertaining the claim." County Court of Ulster County v. Allen, 442 U.S. 140, 155 (1979); see also Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469 (1983)(state court opinion must clearly express that state court relied on adequate and independent state ground barring federal review; state court reliance on such ground will not be presumed).

Under Ulster County, the critical issue is not whether a state procedural bar exists, but whether the state itself has expressly indicated that a federal claim has been rejected because of a procedural default. Oliver v. Wainwright, 795 F.2d 1524, 1528-29 (11th Cir. 1986); Euell v. Wyrick, 675 F.2d 1007, 1008 (8th Cir. 1982); Klein v. Harris, 667 F.2d 274 (2d Cir. 1981). "The federal court's task is not to apply state procedural rules as though it stood in the state court's shoes", Euell, supra, 675 F.2d at 1008, but to determine whether the state court itself has ruled that a federal claim is barred because of a procedural default. See Silverstein v. Henderson, 706 F.2d 361 (2d Cir. 1983); Maxwell v. Sumner, 673 F.2d 1031, 1034 (9th Cir. 1982); Thompson v. Estelle, 642 F.2d 996, 998 (5th Cir. 1981); Klein v. Harris, supra; Euell v. Wyrick, supra; Oliver v. Wainwright, supra.

Thus, the determinative question is not whether the state court in this case could have rejected Mr. Mann's claim on procedural grounds, but whether it actually did invoke a state bar to consideration of the claim:

> Federal review is not barred by the defendant's violation of a state procedural rule if the state court has overlooked the possible procedural bar and decided the case on the merits. Where . . . the state court might have invoked a procedural bar but has provided no indication that it did so, "a federal court must address the merits" of the petitioner's claim. If the state court does not "indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for

the State by entertaining the claim."

Oliver v. Wainwright, 795 F.2d 1524, 1528-29 (11th Cir. 1986) (citations omitted); accord, Cooper v. Wainwright, 807 F.2d 881, 886-87 (11th Cir. 1986); Campbell v. Wainwright, 738 F.2d 1573, 1576-77 (11th Cir. 1984), cert. denied, ___ U.S. ___, 106 S. Ct. 1652 (1986); Grizzell v. Wainwright, 692 F.2d 722, 724-25 (11th Cir. 1982), cert. denied, 461 U.S. 943 (1983); Moran v. Estelle, 607 F.2d 1140, 1142 (5th Cir. 1979).

The Florida Supreme Court chose not to specifically apply a procedural bar. It spoke to the merits. As the United States Supreme Court has held in Caldwell v. Mississippi:

> The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case. See Ulster County Court v. Allen, 442 U.S. 140, 152-154, 99 S.Ct. 2213, 2222-2223, 60 L.Ed.2d 777 (1979). Moreover, we will not assume that a state court decision rests on adequate and independent state grounds when the "state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." Michigan v. Long, 463 U.S. 1032, 1040-1041, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983). "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." Id., at 1041, 103 S.Ct., at 3476.
>
> An examination of the decision below reveals that it contains no clear or express indication that "separate, adequate, and independent" state law grounds were the basis for the Court's judgment.

Id., 105 S. Ct. at 2638-39 (emphasis supplied). That analysis applies with full force to Mr. Mann's claim. See Spencer v. Kemp, 781 F.2d at 1470 & n.21 ("The

principles derived from [direct review] cases . . . are as applicable on federal collateral review of a state court conviction as they are on direct appeal."). No "independent and adequate" state law ground was relied upon by the state court. Cf. Francois v. Wainwright, 741 F.2d 1275, 1281 (11th Cir. 1984).

Moreover, at the very least, the Florida Supreme Court's opinion must be viewed as ambiguous. The Court never clearly applied a procedural bar. Given such an ambiguity, federal merits review is required because "the Sykes rule does not apply when it is not clear that the state appellate court has applied a procedural bar." Walker v. Engle, 703 F.2d 959, 966 (6th Cir. 1983) (emphasis in original), citing Ulster County Court v. Allen, 442 U.S. 140 (1979); see also Oliver, supra.

Ulster County requires the federal courts to determine first whether the state courts have clearly ruled that a procedural default has occurred before employing the Wainwright v. Sykes analysis. If the state courts have not expressly held that a federal claim is barred due to a procedural default, then Sykes does not apply. See Raper v. Mintzes, 706 F.2d 161, 164 (6th Cir. 1983); Maxwell v. Sumner, supra; Oliver, supra; Silverstein, supra.

This Circuit follows this approach. In Campbell v. Wainwright, the state trial court had ruled that issues presented under a Florida Rule of Criminal Procedure 3.850 proceeding:

> [had] been foreclosed by the appeal in this case, were judgment decisions of [Campbell's] counsel, or are otherwise insufficient to justify the relief sought...

738 F.2d 1573, 1577 (11th Cir. 1984). The state appellate court affirmed the trial court's order without expressly indicating "that it would not consider Campbell's allegations because he failed to raise them on appeal." 738 F.2d at 1577. Before

the federal courts, the state argued that the portion of the trial court's order stating that issues were "foreclosed by the appeal" was the application of a procedural bar to Campbell's claims, i.e., a ruling that Campbell had failed to raise the issues in his direct appeal. This Court rejected that argument:

> The court may have meant that the issues were correctly decided adversely to Campbell on appeal, and need not be discussed further. In any event, because of the alternative phrasing of the court's order, we cannot determine which issues the court may have considered to be "foreclosed". Given this situation, a federal court must address the merits.

738 F.2d at 1577 (emphasis supplied) (footnote omitted); see also id. at n.2, citing Ulster County.

In Oliver, this Court held that,

> Where ... a state court might have invoked a procedural bar but has provided no indication that it did so, "a federal court must address the merits" of the petitioner's claim ... If the state court does not "indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim."

Oliver v. Wainwright, supra, 795 F.2d at 1528-29 (citing Campbell and Ulster County) (emphasis supplied). Accord, Silverstein v. Henderson, supra, 706 F.2d 361; Maxwell v. Sumner, supra, 673 F.2d 1031; Kreck v. Spalding, 721 F.2d 1229, 1234 (9th Cir. 1983).

Under Campbell and Oliver, this Circuit's application of the Ulster County and Michigan v. Long analyses mandates that the federal court reach the merits of a habeas corpus petitioner's constitutional claims when the state courts failed to expressly hold that the claims were barred due to a procedural default. Moreover, federal review of the merits of a constitutional claim is required when the state

court's opinion is ambiguous as to the application of a procedural bar. Campbell, supra; Oliver, supra. See also Spencer v. Kemp, supra. As succinctly stated by Judge Clark in his opinion concurring with the panel grant of relief in Mr. Mann's case, "[i]t is not too much to require the state court to be explicit when applying its procedural default rules." 817 F.2d at 1488. The Florida Supreme Court was far from explicit here -- Mr. Mann's claim must therefore be entertained on the merits.

III

THE DEATH SENTENCE IMPOSED ON MR. MANN WAS OBTAINED IN SUBSTANTIAL RELIANCE ON AN UNCONSTITUTIONAL PRIOR CONVICTION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.[28]

The gravamen of Mr. Mann's claim is that the use of an unconstitutional prior conviction to enhance punishment in his case resulted in a sentence of death obtained on the basis of "misinformation of constitutional magnitude" and thus in a violation of the eighth and fourteenth amendments as interpreted in Zant v. Stephens, 462 U.S. 879, 887-88 (1983), United States v. Tucker, 404 U.S. 443, 447-49 (1972), and Burgett v. Texas, 389 U.S. 109, 115 (1967) (use of unconstitutional prior conviction to enhance punishment permits "a specific federal right [to be] denied anew.").

The state courts denied Mr. Mann a hearing on his claim on the basis of a procedural bar which had never before been announced and of which Mr. Mann "could not

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28. Mr. Mann's Initial [Panel] Brief (pp. 40-60) described the unconstitutionality of the previous Mississippi conviction used to aggravate sentence. See also Petition for a Writ of Habeas Corpus, (R. Vol 1). The panel briefs also described why Florida's reliance on that conviction violated the eighth and fourteenth amendments, why Mr. Mann is entitled to an evidentiary hearing in the district court on this claim, and why the claim is not procedurally barred. Mr. Mann respectfully refers the Court to the panel briefs on these matters. However, one important matter merits discussion herein.

fairly be deemed to have been apprised." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457 (1958). That bar does not pass muster under federal analysis, and Mr. Mann is therefore entitled to the opportunity to prove his claim at a hearing in the federal district court.

In his state motion for post-conviction relief, Mr. Mann argued that the Mississippi conviction was unconstitutional and that his challenge to that constitutional infirmity was properly presented in his state-court post-conviction action. The Florida Supreme Court rejected Mr. Mann's "contention that it is appropriate in a collateral attack on his sentence of death to attempt to collaterally attack Mann's prior conviction of a crime of violence in Mississippi. . . . " Mann, 482 So. 2d at 1361.

Prior to that ruling, Florida courts had consistently allowed collateral attacks on the validity of prior convictions used to enhance the penalty for a subsequent offense. See Lee v. State, 217 So. 2d 861 (Fla. 4th DCA 1969)(challenging constitutionality of prior conviction used to support a "second offender" conviction); Hicks v. State, 336 So. 2d 1244 (Fla. 4th DCA 1976)(requiring a hearing in Rule 3.850 proceedings to determine if prior uncounseled conviction had been used in imposing sentence). While the majority of such collateral attacks involved the use of uncounseled prior convictions, see Mann v. Dugger, 817 F.2d 1471, 1484 (11th Cir. 1987), and cases cited therein, Florida courts had never so limited collateral attacks. See Lee, 217 So. 2d 861 (Fla. 4th DCA 1969). Cf. Allen v. State, 463 So. 2d 351, 359-61 (Fla. 1st DCA 1985). The Florida Supreme Court did not rule that such challenges were limited to Gideon v. Wainwright, 372 U.S. 335 (1963), issues in Mr. Mann's case. Rather, for the first time ever, it ruled that any attack on the

prior conviction in a collateral proceeding was improper.

The law in Florida has always been that the use of a prior conviction to enhance a sentence "must be predicated upon a prior conviction not obtained in violation of one's constitutional rights." Lee, 217 So. 2d at 365. For example, in a related context, the Florida Supreme Court had held that a prior conviction is subject to an attack on its "organic validity":

> The relevant aspect of the former conviction is simply its organic validity. For example, it could be shown that the judgment was obtained in a court that lacked jurisdiction, or that it was otherwise so fundamentally defective that it could not constitutionally support a conviction. In this posture, the prior case is not being retried on its merits. The judgment which it produced is merely being subjected to the test of admissibility by applying standards of organic validity.

State v. Davis, 203 So. 2d 160, 162 (Fla. 1967). Cf. Allen v. State, 463 So. 2d 351, 356-59 (Fla. 1st DCA 1985)(prior conviction obtained in violation of any one of several fundamental rights may not be used to establish subsequent offense); Rasul v. State, 498 So. 2d 1022, 1023 (Fla. 2d DCA 1986).

Clearly, when Mr. Mann's motion was filed, a Rule 3.850 motion was the only proper state-court forum in which Mr. Mann could bring his challenge to his prior conviction. The Florida courts had long-recognized Rule 3.850 as the appropriate vehicle for such a challenge. The State of Florida relied upon the Mississippi judgment to establish aggravating factors, thus placing the constitutional validity of the prior conviction at issue in the instant case. See Lee, 217 So. 2d at 365 (facts that prior sentence has expired and prior conviction occurred in another jurisdiction do not preclude collateral attack in courts having jurisdiction over subsequent conviction).

Inexplicably, however, the Florida courts refused to provide Mr. Mann the forum which had always been provided to other litigants raising similar claims. The Florida courts invoked a novel procedural bar of which Mr. Mann "could not fairly be deemed to have been apprised." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457 (1958). Such a novel bar simply cannot be deemed an adequate and independent state law ground barring review in this federal court. Spencer v. Kemp, supra; see also James v. Kentucky, 466 U.S. 341 (1984)(only "firmly established and regularly followed state practice can prevent implementation of federal constitutional rights"); Barr v. City of Columbia, 378 U.S. 146, 149 (1964)("We have often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive us of the right of review"); Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982)("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly").

Mr. Mann's claim is before this Court on the merits. He should be granted an evidentiary hearing in the district court and, thereafter, federal habeas corpus relief.

IV

MR. MANN'S SENTENCE OF DEATH VIOLATES DOYLE V. OHIO AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE IT WAS BASED ON A RECOMMENDATION OF DEATH OBTAINED FROM A JURY WHICH WAS TOLD THAT MR. MANN "SHOWED" NO REMORSE AFTER A POST-ARREST, POST-MIRANDA WARNINGS INVOCATION OF HIS RIGHT TO SILENCE.

A. MR. MANN'S RIGHTS UNDER DOYLE V. OHIO, WAINWRIGHT V. GREENFIELD, AND THE EIGHTH AMENDMENT WERE VIOLATED.

At the penalty phase of Mr. Mann's trial, the state presented the testimony of Lieutenant Judson Brooks, a Pascagoula, Mississippi, police officer (ROA 2375).

Lieutenant Brooks had arrested Mr. Mann for a 1973 burglary charge in Mississippi (ROA 2376). Prior to Brooks' testimony, at a sidebar conference, the state explained that the purpose of Brooks' testimony was to demonstrate "the Defendant's reaction as to when he was arrested. I think it will go to the psychiatric testimony in terms of the man's emotional status and condition" (ROA 2374).

Lieutenant Brooks testified that he traveled to Titusville, Florida, where Mr. Mann had been placed in custody, to arrest Mr. Mann and transport him back to Mississippi (ROA 2376). After Lieutenant Brooks explained that he "present[ed] the [arrest] warrant to the suspect . . . and advise[d] him in reference to the charges" (ROA 2376), the following exchange occurred between the prosecutor and Lieutenant Brooks:

> Q When you read that warrant to him, were you looking at him?
>
> A Yes, sir.
>
> Q Did he display any remorse at that time?
>
> A No, sir.
>
> Q Did he display any regret at that time?
>
> A No, sir.
>
> Q Did he display any sorrow?
>
> A No, sir.
>
> Q Subsequent to that, did you drive back to Pascagoula, Mississippi, with him in your presence?
>
> A Yes, sir.
>
> Q During that entire time period, did the man show any emotion at all?

A In reference to the charges, no. The only emotion he ever showed was an occasion in Daytona Beach when we stopped for dinner, and he became emotionally upset because I would not let him have beer with his meals.

Q That's the only time he ever showed emotion, when you wouldn't let him drink beer with his dinner?

A That's correct.

Q That was after he was arrested on the charges you just read?

A Yes.

(ROA 2377-78).

The lack of communication Lieutenant Brooks was referring to occurred after he had arrested Mr. Mann and provided him with Miranda warnings. In an affidavit in January, 1986, Lieutenant Brooks attested:

> [I]t is my normal procedure to advise defendants of their Miranda rights immediately upon placing them under arrest.
>
> Larry Eugene Mann made no statements and therefore none were used against him in his Mississippi conviction.

(Pet. App., Volume 1, section 10).29/

The state's presentation and use of this testimony regarding Mr. Mann's post-Miranda silence fit into the theme begun during the guilt/innocence phase closing arguments that Mr. Mann was a person without emotion:

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29. The allegations presented to the district court were sufficient, if true, to warrant habeas corpus relief. Mr. Mann was therefore entitled to an evidentiary hearing on his claim.

> You sat through this entire trial . . . and I have watched you look at the Defendant. How would you describe him during the course of what can only be described as emotionally heartrending testimony the first day of this trial? Did his expression change? Was he moved by emotion at all? Or did he appear to be cold and calculated? You look at him, and he shows no emotion at all. . . .

(ROA 2271).

Working up to Lieutenant Brooks' testimony, the state presented the testimony of Debra Johnson, the victim of the Mississippi offense.[After Ms. Johnson described her in-court identification of Mr. Mann, the prosecutor turned the questioning to Mr. Mann's emotional condition at that time:

> Q During the time that this was going on, did Mr. Mann display any emotion to you whatsoever?
>
> A No, he didn't.
>
> Q Did he ever display any remorse or regret?
>
> A No, he didn't.
>
> Q Did the expression change on his face?
>
> A No.

(ROA 2372-73). The state then presented Lieutenant Brooks, with the sole purpose of completing the picture of Mr. Mann as cold, unfeeling, and inhuman.

Finally, the state relied on this picture in closing argument at the penalty phase, portraying Mr. Mann as a person who "does not deserve to remain alive" (ROA 2435). The state's argument was that Mr. Mann was a "pathological killer" (ROA 2437), whose behavior could not be explained by the defense's "absurd" psychiatric evidence (ROA 2432-33).

The presentation and use of evidence of post-<u>Miranda</u> silence is forbidden by the

United States Constitution. Doyle v. Ohio, 426 U.S. 610 (1976). Doyle reversed a criminal conviction where the prosecution attempted to impeach a defendant's exculpatory trial testimony by eliciting testimony that the defendant remained silent following Miranda warnings. The Court reasoned that the promise of a right to remain silent carries with it the implicit promise that silence will not be penalized. Doyle, 426 U.S. 610, 619, quoting United States v. Hale, 422 U.S. 171, 182-83 (1975)(White, J., concurring). Thus, use of a defendant's post-Miranda silence is fundamentally unfair, in violation of the due process clause of the fourteenth amendment. Doyle, 426 U.S. 610, 619.

Similarly, post-Miranda silence may not be used to rebut an insanity defense. Wainwright v. Greenfield, 106 S.Ct. 634 (1986). Using post-Miranda silence as affirmative proof is indistinguishable from using such silence for impeachment:

> The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the state gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations.

Greenfield, 106 S.Ct. 634, 639. The Court concluded that just like Doyle, "Greenfield received 'the sort of implicit promise to forego use of evidence that would unfairly "trick" [him] if the evidence were later offered against him at trial.'" Id. at 640, quoting South Dakota v. Neville, 459 U.S. 533, 566 (1983).

The considerations highlighted in Doyle and Greenfield are especially important

at a capital sentencing phase. The Constitution requires heightened reliability at a penalty proceeding where a defendant's life is at stake. Gardner v. Florida, 430 U.S. 349 (1977). Therefore, just as a defendant's exercise of constitutional rights may not be used to obtain his conviction, even more so may the exercise of those rights not be used to take his life. See, e.g., Estelle v. Smith, 451 U.S. 454, 462-63 (1981)("Just as the Fifth Amendment prevents a criminal defendant from being made 'the deluded instrument' of his own conviction, . . . it protects him as well from being made the 'deluded instrument' of his own execution. . . . We can discern no basis to distinguish between the guilt and penalty phase . . . so far as the protection of the Fifth Amendment is concerned.").

At Mr. Mann's trial, the state presented evidence of Mr. Mann's post-Miranda silence for the stated purpose of showing "the Defendant's reaction as to when he was arrested. I think it will go to the psychiatric testimony in terms of the man's emotional status and condition" (ROA 2374). The state thus used Mr. Mann's silence as affirmative proof rebutting his psychiatric mitigating evidence, and as affirmative proof of aggravation--no remorse. Mr. Mann presented psychiatric testimony concerning his paranoid rage and irresistible pedophilia, and the self-hate, sorrow, and pain which Mr. Mann experienced because of his condition. The "no remorse" testimony undercut Mr. Mann's mitigation and was used to aggravate the offense -- it gave the jury an additional reason to sentence Mr. Mann to death.30/

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30. Consequently, contrary to the panel's analysis, because the prosecution used Mr. Mann's post-Miranda silence before the jury in a capital sentencing proceeding as both evidence rebutting mitigation and proving aggravation, the Doyle violation cannot be harmless error. Although a Doyle error may be found harmless, see Doyle, 426 U.S. at 620, such a "decision requires an examination of the facts,
[footnote continued on next page]

There is more than a reasonable probability that the comments on Mr. Mann's silence contributed to his death sentence. The prosecution highlighted, stressed, and focused on Mr. Mann's silence, asking Lt. Brooks five times and Ms. Johnson three times about Mr. Mann's emotional status. The testimony was purposely elicited, as the prosecutor stated before the testimony began (ROA 2374), as a planned part of the state's case for death. There was no objection to it, and the jury was never told to disregard the testimony. The repetitive questioning focused the jury's attention on the precise point the prosecution was trying to make -- that Larry Mann was inhuman and did not deserve to live. But the point was made by use of Mr. Mann's post-Miranda warnings silence. This Doyle prohibits.

The evidence of "guilt" -- that death was the appropriate sentence -- was not so powerful and overwhelming as to make the error here harmless. The defense presented the jurors with powerful and persuasive evidence of Mr. Mann's mental illness, his family life, his employment, and his military service. In fact, the plausibility of the defense case was the precise reason why the state presented Lt. Brooks' testimony: "it will go to the psychiatric testimony in terms of the man's emotional status and condition" (ROA 2374). As such, the testimony was calculated to, and did, "strike at the jugular" of Mr. Mann's defense.

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30. [continued from previous page]

the trial context of the error, and the prejudice created thereby as juxtaposed against the strength of the evidence of defendant's guilt." United States v. Meneses-Davila, 580 F.2d 888, 890 (5th Cir. 1978). If this examination shows that there is no reasonable probability that the Doyle violation contributed to the conviction [in this case, the jury's death recommendation] the error is "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18 (1967). See Chapman v. United States, 547 F.2d 1240, 1249 (1977); Alderman v. Austin, 695 F.2d 124, 126 (1983). That showing cannot be made in Mr. Mann's case.

The testimony regarding Mr. Mann's post-Miranda silence went hand-in-hand with prosecutorial misconduct of the most egregious sort. (See, e.g., ROA 2430-32, 2435-36, 2437-38). It focused the jury's attention on an impermissible aggravating factor -- lack of remorse -- presented to prove that Mr. Mann had been so unrepentant for so long that there was no solution except to execute him. It struck at the heart of Mr. Mann's mitigation -- that he was seriously mentally ill -- to portray him as a cold and calculating monster, devoid of human emotion. It was by no means harmless beyond a reasonable doubt.

B. MR. MANN'S CLAIM IS NOT A PROCEDURALLY BARRED.

The arguments presented in Issue II, infra, which demonstrated that federal review of that claim was not barred by any adequate and independent state law ground apply with equal force to Mr. Mann's Doyle/Greenfield claim.31/

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31. Additionally, Mr. Mann respectfully refers the Court to the arguments presented in his initial and reply briefs to the panel, as well as to the discussion concerning procedural default in the panel opinions of Judges Johnson and Clark.

CONCLUSION

The district court's denial of the writ should be reversed; Mr. Mann's case should be remanded for an evidentiary hearing; and, Mr. Mann should be granted the habeas corpus relief he seeks.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Gary Welch and Michael Kotler, Assistant Attorneys General, Department of Legal Affairs, Park Trammell Building, Suite 804, 1313 Tampa Street, Tampa, Florida 33602, this 23rd day of October, 1987.

Talbot D'Alemberte
Attorney

APPENDIX 2

APPENDIX A

throughout the entire course of the prosecution, I believe the thrust of the prosecution will be that she was abducted and that she died in a grove and that she never physically entered Mr. Mann's house or left his truck.

And on a warrant to search Mr. Mann's house, we are just suggesting and we're arguing that it has no connection whatever with the murder of this victim. If there is any plain logic in the State's position, it should have been outlined in the affidavit. It is not outlined in the affidavit.

The affidavit should speak for itself. It does not. For that reason, we would move to suppress it.

THE COURT: The Court will find specifically that there was sufficient probable cause for the issuance of the search warrant. Therefore, the motion is denied.

Next motion?

MR. DOHERTY: The next motion, Judge, that I have is an amended motion for individual voir dire. Attached to it, I have the case of Hovey versus Superior Court of Alameda County, a California case, Supreme Court of California, 1980. The thrust of this motion is to ask the Court to allow us to individually voir dire the jury; and in doing so, we're asking the Court not

we would ask the Court to grant our motion.

MR. SCHAEFFER: Judge, the second reason for that, I would like to add, initially when this motion was raised by Mr. Doherty, Judge Andrews denied the motion for individual voir dire with leave to come back before this Court at a later time.

The issue that was raised particularly there -- this is a new issue in the amended motion. We would like to renew our grounds that we raised at that time. In essence, what we said at that time is that there had been quite a bit of pre-trial publicity in the St. Petersburg Times, the Evening Independent in the south county, and the Clearwater Times and Clearwater Sun.

Since this motion has been argued before Judge Andrews, there has been additional pre-trial publicity. The problem that we see as defense lawyers, obviously, is it is necessary for us to inquire which, if any, of these potential jurors have read information in the paper.

Now, if, in fact, there was information in the paper, all of which was going to come out in the trial, then it would not matter if they had read it because they would hear it anyway. But we have a lot of problems, because in these particular articles in

THE COURT: I will deny the motion for individual voir dire. If it should appear during the course of the voir dire that that might be appropriate, I'll reconsider that motion. But at this time, it will be denied.

Next motion, please.

MR. DOHERTY: Your Honor, the next motion we have is a motion in limine with regard to the testimony of a blood expert with regard to luminol, the luminol test, and a phenophtalein test.

And the thrust of our motion in limine is that neither test, separately nor both tests in tandem, can conclude that the substance which has given a positive reading for these tests is human blood. The expert, Theordore Yeshion, pointed out in his deposition that neither test individually nor both in conjunction can eliminate household bleach or animal blood as a source of the positive reaction.

Neither can these tests tell this jury when the stain was made. It is an accepted proposition that the Defendant has not always owned this 1956 pick-up truck, that there have been previous owners. There is nothing about this guy's testimony that would lead this Court to believe, nor the jury to believe, that the stain was made while this person was even the owner

(THEREUPON, the prospective jurors indicated affirmatively.)

MR. MEISSNER: You have heard the judge say that this jury needs to be sequestered. This case will, in best estimates of counsel, take at least through Wednesday and possibly through Thursday to complete. It should not go into Friday, although it may. It will not spill over into the weekend or next week.

It has been agreed that the jury should be sequestered. There may be news coverage of this proceeding, and your attention needs to be directed only to what comes from the witness stand and not to what you may read or hear in the press or in the media about this case, because that's not evidence. Do you all agree with that, with that concept?

(THEREUPON, the prospective jurors indicated affirmatively.)

MR. MEISSNER: Judge Federico sits there as the embodiment of the law in this case. He makes a determination as to what you can hear and what can be presented to you. He passes upon the legality or the legal admissibility of the evidence, and he doesn't have the opportunity to do that in terms of what the press may report or the emphasis that the press may give to something that may be out of proportion to its

real importance. Does that make sense to you all?

(WHEREUPON, the prospective jurors indicated affirmatively.)

MR. MEISSNER: We all understand that being sequestered is a hardship, but it's necessary. In our system of justice, you heard the judge indicate that Larry Mann, the Defendant, has been indicted by a Grand Jury in Pinellas County and charged with first degree murder and kidnapping. We have gone as far as we can go at this point in processing this case through the system. We can go no further without a jury to hear the facts and pass upon the matters of guilt or innocence.

You all realize that, that this Defendant has asserted his right to a jury trial and he is entitled to a jury trial? He is entitled to have the State prove evidence, present evidence and prove its case against him, and that we can't do anything more until twelve people agree to sit as a jury, sacrificing a little time out of their lives to accommodate the system that we all live by.

So, I heard the audible groan, we all heard that. We know it's an imposition, jury service. Under the best of circumstances, jury service is an imposition. But if you all don't do it, there isn't anybody else

MR. McMULLEN: No, sir.

MR. MEISSNER: Mr. McMullen, have you ever served on a jury before?

MR. McMULLEN: No.

MR. MEISSNER: In terms of fulfilling your function as jurors, I want to address a couple of questions to you. You all do understand that a jury in a criminal case tries the facts of the case. I have already indicated that Judge Federico passes on questions of law. Do you all understand and agree that you don't sit there as twelve lawyers? You will be convinced at the end of this thing there are enough lawyers in the courtroom.

Your function as individuals of diverse backgrounds, as persons representing the community, is to bring your experience and your wealth of knowledge to this situation and apply your common sense and intelligence to the evidence and the testimony that you hear in reaching your decision. Do you all agree with that proposition, that this is really not an opportunity to be Sherlock Holmes or Clarence Darrow; that you have a specific function to perform, as the attorneys do in the case and as the judge? Do you all agree with that proposition?

(THEREUPON, the prospective jurors indicated

affirmatively.)

MR. MEISSNER: The judge will instruct you on the law in the State of Florida, if you are chosen to sit on this jury, at the conclusion of the case. In fact, you will have the opportunity to take those instructions back to the jury room with you. The bottom line of that is that you do agree with the fundamental proposition, again, that you apply the law as Judge Federico gives it to you and not as you think the law should be, or as the law was in New Jersey or as the law was in Pennsylvania or anything of that nature?

Can you all commit to follow the law that Judge Federico gives you in applying it to the facts, in reaching a determination in this case? Does anybody have any difficulty with that?

(THEREUPON, the prospective jurors indicated negatively.)

MR. MEISSNER: The Defendant has asserted his right to a jury trial. You're here and you're going to give him his jury trial. You're going to determine the issue of guilt and innocence, or the jury that sits will determine the issue of guilt or innocence. In that regard, the jury acts alone. Nobody else second-guesses you. You make the determination of the weight and sufficiency of the evidence, the

1 credibility of the witnesses, and you come back and
2 [illegible]dge Federico whether he is guilty or innocent.
3 [illegible] there any of you that are unwilling or feel
4 that you are unable to undertake that responsibility
5 under your oaths as jurors and citizens of Pinellas
6 County? Do you all think you can do that?
7 (THEREUPON, the prospective jurors indicated
8 affirmatively.)
9 MR. MEISSNER: Okay. You have diverse backgrounds.
10 I notice, Doctor Lee, that you are a medical doctor.
11 DR. LEE: Yes.
12 MR. MEISSNER: Do you have a specialty, sir?
13 DR. LEE: Cardiology.
14 MR. MEISSNER: Cardiology. I ask that because
15 this becomes important in the scheme of things in a
16 particular case, Doctor Lee, because in this case, we
17 intend to call Doctor Corcoran, who is a pathologist.
18 He works with the Medical Examiner's office. He is
19 going to give testimony and render an opinion with
20 regard to cause of death, as pathologists and medical
21 examiners are trained to do. Do you think you would
22 have any difficulty -- have you had any difficulty
23 with pathologists that would make you say, I wouldn't
24 believe anything a pathologist tells me, or I would
25 believe anything a pathologist tells me?

1 important to the Defendant. We not only want to try
2 this Defendant, we want to give him a fair trial, as
3 fair a trial as we can before we pronounce a verdict.
4 Do you all agree with that?
5 (THEREUPON, the prospective jurors indicated
6 affirmatively.)
7 MR. MEISSNER: This case, as you know by now,
8 involves the charge of murder in the first degree.
9 Murder in the first degree can be a capital offense
10 in the State of Florida. It is an offense for which
11 the Court may impose the death penalty. Now, whether
12 you agree or you don't agree with the imposition of
13 the death penalty is relevant to us in this case and
14 relevant under the law, only as it may affect your
15 ability to render a fair and impartial verdict.
16 And to put that another way, regardless of your
17 personal feelings for or against the death penalty,
18 would the fact that this case may result in the Court
19 imposing the death penalty raise such a problem with
20 you that you do not feel that you could convict if the
21 evidence was there to convict?
22 DR. LEE: I may have --
23 MR. MEISSNER: Doctor Lee, you feel you have that
24 problem?
25 DR. LEE: I have got a mixed bag of worms on this

we actually have two stages or two phases of the proceedings.

The first phase relates to the guilt or the innocence of the Defendant. At that point, the State puts on its case in chief against the Defendant in an attempt to convince the jury that he is guilty of murdering Elisa Nelson, beyond and to the exclusion of every reasonable doubt. The jury, in Florida, has the opportunity to go back and to deliberate that issue. Obviously, if the jury finds him to be innocent, they come back and say so, and he walks out of the courtroom and that's the end of that.

If the jury, however --

MS. SCHAEFFER: A brief objection at this point. I wish he would not refer to innocent. I think it's going to be guilty versus not guilty. I think there is a difference.

THE COURT: All right.

MR. MEISSNER: Thank you. If, on the other hand, this jury ultimately at the conclusion of the State's case, convicts, walks back into the courtroom and says that he is guilty of murder in the first degree, there then begins a separate portion of the proceeding in front of the same jury panel with additional testimony and evidence being presented, at which time you again --

these are matters that were not brought to your attention in the prior portion of the trial. The jury then has the opportunity to go back and deliberate whether or not you will come back and make a recommendation of mercy to the Court.

The recommendation that you make to Judge Federico in this portion of the trial is simply a recommendation, and he is not bound by it. He may impose whatever sentence the law permits. He will have been here and will have listened to all of the testimony himself.

Doctor, with that in mind, knowing that in the first phase, the question is, did he do it, would your feelings about the taking of a human life, whether it be in the form of a murder or in the form of a legal execution at some point, would the possibility of that --

DR. LEE: It would not change my feelings.

MR. MEISSNER: You still think you would have difficulty rendering a guilty verdict regardless of the evidence?

DR. LEE: If there was an outside chance that there might be capital punishment --

MS. SCHAEFFER: We would have the Witherspoon problem.

MR. MEISSNER: Yes, we may have.

THE COURT: Doctor, you may be excused.

Lena M. Bonebrake.

MR. MEISSNER: What was the last name?

THE COURT: Bonebrake, B-O-N-E-B-R-A-K-E.

THE BAILIFF: Remain standing, ma'am, face the Clerk, and raise your right hand.

(THEREUPON, Prospective Juror Number Two was duly sworn.)

MR. MEISSNER: Good morning, Ms. Bonebrake. Were you able to hear all of my questions and the answers?

MS. BONEBRAKE: Yes.

MR. MEISSNER: Have you had any problem with any of the questions or anything that would cause you difficulty in sitting on this jury so far?

MS. BONEBRAKE: No.

MR. MEISSNER: Okay. Are we all now up to speed on where we're going? Do you understand that the first portion of the trial relates to guilty/not guilty? The second separate portion of the trial involves different evidence, different testimony, the possibility of that, in deeming whether or not you will recommend to the judge mercy in dealing with the Defendant? Does everybody understand that that's the procedure that will be followed in this case now?

1 Do any of you have feelings, as Doctor Lee did,
2 do any of you feel as Doctor Lee did with regard to
3 the imposition of the death penalty, that possibility?
4 You understand you do not impose the death penalty;
5 that is not on your shoulders. The ultimate decision
6 rests with Judge Federico. But as I have tried to
7 explain it to you, do any of you hold the opinion, as
8 Doctor Lee did -- he has such a moral dilemma as a
9 result of his training as a physician with even the
10 possibility that someone else would impose the death
11 penalty in this case, even feeling it was warranted
12 the imposition.
13 That causes him such problems that he could not,
14 regardless of the evidence, no matter how damning the
15 evidence would be against the Defendant, that he could
16 not vote to find him guilty of murder in the first
17 degree. Do any of you have that problem? I need an
18 assurance from each of you on this.
19 MR. GORDON: What's the alternative? Is it life
20 in prison?
21 MR. MEISSNER: Yes, it is. Again, that decision
22 rests up here with the law, with Judge Federico. You
23 will have the opportunity after you have heard
24 everything there is to hear to make a recommendation
25 to him. But it is not legally on your shoulders,

1 though. It is not your ultimate decision. You act in
2 that regard in an advisory capacity only. Does that
3 cause you any difficulty?
4 MR. GORDON: No.
5 MR. MEISSNER: Ms. Bonebrake, you have never
6 served on a Grand Jury before?
7 MS. BONEBRAKE: No.
8 MR. MEISSNER: You have never been a member of a
9 panel that investigates offenses and makes a
10 recommendation as to whether to charge --
11 MS. BONEBRAKE: No.
12 MR. MEISSNER: You have never served on a petit
13 jury or a trial jury before?
14 MS. BONEBRAKE: Never.
15 MR. MEISSNER: Were you a schoolteacher, ma'am?
16 MS. BONEBRAKE: Yes, sir.
17 MR. MEISSNER: What grade and what subject matters
18 did you teach?
19 MS. BONEBRAKE: Junior and senior high school,
20 mathematics and home economics.
21 MR. MEISSNER: Okay. I assume you did not teach
22 sophisticated mathematics as it relates to probability
23 and that kind of thing to any great extent?
24 MS. BONEBRAKE: Not to that extent. It was
25 primarily elementary algebra.

degree murder, you have a lesser charge of second degree murder; you have a lesser charge of third degree murder, and a lesser charge of manslaughter. You can return a guilty verdict for any one of those four charges or a verdict of not guilty.

Only guilty of murder one requires a death penalty. And there are only two alternatives the Court has: One is death in the electric chair; the other is life with a minimum mandatory twenty-five years before the person becomes eligible for parole. I think a lot of people get the idea that if somebody gets a life sentence, they get out in seven years.

That isn't the case in a first degree murder. It does carry a maximum of life, a minimum mandatory of twenty-five years before a person becomes eligible. That is the alternative the judge has, one of those two.

MR. GORDON: Is that the judge's discretion, or is that by law?

MS. SCHAEFFER: By law, the judge only has two choices if you return a verdict of murder in the first degree. Like Mr. Meissner said, you go back and render an advisory opinion as to what you people believe is the appropriate sentence, whether you believe that the appropriate sentence is death or whether you believe

the appropriate sentence is life with a minimum mandatory twenty-five years.

Now, he just doesn't disregard that and do whatever he wants to. He is, by law, required to give your recommendation great weight, but he is also permitted to overrule your recommendation if he desires to do so and he feels under the law he should. But he can still only do one of those two things. The law does not give him any other discretion.

He has to, ultimately, if Mr. Mann is convicted of murder in the first degree, say, I sentence you to death, life, or the minimum mandatory of twenty-five years. That's the only two options he has. Okay? Does that clear that up? Does everybody understand that?

(THEREUPON, the prospective jurors indicated affirmatively.)

MS. SCHAEFFER: Ms. Clow, I didn't understand whether you were now retired or still working.

MS. CLOW: I'm retired.

MS. SCHAEFFER: Okay. Mr. Meissner's experience is broader than mine. What does a Social Security claims representative do, exactly?

MS. CLOW: We interview claimants who come in to file for benefits, for retirement, disability.

advisory opinion.

If you don't believe that, if you believe the aggravating -- or there is aggravation not outweighed by mitigation, then, by law, you are supposed to return a death decision. And that is advisory only and it goes to the judge. It is not quite -- there are some guidelines there for you. It wouldn't be appropriate for me at this time to go into it, but the judge will at some time.

He will give you a lot on one side and a lot on the other for you to consider in determining what will be the appropriate jury recommendation. Okay?

MR. GORDON: Okay. May I ask one more question?

MS. SCHAEFFER: Certainly.

MR. GORDON: I understood what Mr. Meissner stated that we would sit on a two-part trial, that one determines guilt or innocence.

MS. SCHAEFFER: That's where I objected. It's not guilt or innocence. It's whether it is guilty or not guilty, either innocent or not proved beyond every reasonable doubt.

MR. GORDON: Excuse me. Let me rephrase it. Guilty or not guilty.

MS. SCHAEFFER: Right.

MR. GORDON: Then you go into a second phase in

1 think should be flagged to the Court before we proceed
2 with the voir dire examination.
3 As you now know, this is a murder case. You now
4 know that the Defendant is charged with first degree
5 murder. You know that if the jury returns a verdict
6 of guilty of murder in the first degree, that you will
7 be asked to deliberate further after additional
8 evidence and testimony has been given, under some
9 guidelines, in order that you can offer Judge Federico
10 an advisory opinion as to what sentence you think he
11 ought to consider imposing, whether you think there
12 should be a recommendation of mercy or whether you
13 think that the man should be sentenced to the electric
14 chair.
15 My question is, assuming that there is a finding
16 of guilty of murder in the first degree, and assuming
17 that there are sufficient aggravating circumstances
18 presented as to warrant that you recommend the
19 imposition of the death penalty, is there anyone here
20 who is so opposed to that that you could not think
21 you could follow the law and return such a recommendation
22 regardless of what the aggravating circumstances were?
23 Do any of you have that kind of problem with the
24 imposition of the death penalty?
25 (THEREUPON, the prospective jurors indicated

twenty-four ears, twelve brains working on the evidence. The twenty-four eyes and the twenty-four ears and the twelve brains working on the evidence are better than one. Will you go back and discuss the case before you voice an opinion, and will you at least listen to what the other members of the jury say?

In reaching your verdict, can all of you do that? Without rehashing all of the questions that have been asked before, do any of you as you sit here feel as though you could not render a fair and impartial verdict in this case, either because of your feelings for or against the possible imposition of the death penalty which, again, is the judge's responsibility, or because of something in your background or the nature of the offense that makes you feel as though without even listening to the evidence, you have your mind made up?

All of you feel as comfortable as you can in this situation? Are all of you prepared to do your duty and to look at this Defendant and bring a verdict back to the courtroom and have that verdict speak the truth?

MR. DOHERTY: Mr. Dance is indicating his answer is no.

MR. MEISSNER: I will get to him.

Can all of you do that? Mr. Dance, are you still having problems?

MS. RUNEY: Auditing.

MR. MEISSNER: All right. Mr. Cooper, any problem with the death penalty as it would relate to your ability to fairly try the issues in this case?

MR. COOPER: I don't think so, no.

MR. MEISSNER: You understand, I am sure, by now that this is a two phase trial. If the jury returns a guilty of murder in the first degree verdict, you are in the position of hearing additional testimony and evidence; and according to guidelines under the law that is given you by the judge, you would render an advisory opinion to the Court.

MR. COOPER: Right.

MR. MEISSNER: As this jury is presently constituted, you do understand you do not impose the death penalty. It is authorized by the law in the State of Florida that the Court would impose it should you find the Defendant guilty and should he find it necessary and proper in this case. If not, the alternative is life imprisonment.

MR. COOPER: Um-hum.

MR. MEISSNER: Mr. Cooper, you are an accountant?

MR. COOPER: Yes, sir.

MR. MEISSNER: Is that the type of work you have done all of your life?

Ms. Schaeffer talk about it and in the context that I have talked about it, that in any way through your opinion or your background or your view of the death penalty that would in any way inhibit your ability to be fair and impartial and return a verdict that the evidence says you should return?

(THEREUPON, the prospective jurors indicated negatively.)

MR. MEISSNER: You both understand that the ultimate responsibility rests with the Court; that it's not the jury's responsibility?

(THEREUPON, the prospective jurors indicated affirmatively.)

MR. MEISSNER: Other than to give an advisory opinion if you find him guilty of murder in the first degree?

(THEREUPON, the prospective jurors indicated affirmatively.)

MR. MEISSNER: Now, Mr. Schlenkerman, you work for Sherwin-Williams?

MR. SCHLENKERMAN: Yes.

MR. MEISSNER: What did you do for Sherwin-Williams?

MR. SCHLENKERMAN: Sherwin-Williams had a large printing plant. I was plant manager.

MR. MEISSNER: Do you have any specific training

The Defendant is charged by an indictment filed in this Court with violations of the laws of the State of Florida relating to murder in the first degree and kidnapping, the elements of which will be explained to you later. It is your solemn responsibility to determine the guilt or innocence of the Defendant, and your verdict must be based solely on the evidence as it is presented to you in this trial and the law in which the Court will instruct you at the close of the trial.

The jury is concerned with the facts; the Court is concerned with the law. The Court is concerned with the facts only to see that they are properly and lawfully presented to the jury. The jury is concerned with the law only as the Court instructs them on the law at the close of the trial. Thus, the province of the jury and the province of the Court are well-defined, and they do not overlap. This is one of the fundamental principles of our system of justice.

Before proceeding further, it is necessary that you understand how this trial will be conducted. First, the attorneys will have an opportunity to address you; that is, to make opening statements to you, and to outline to you their contentions as to the essential facts in the case in accordance with the evidence which may be admitted during the trial for your consideration

1980. We don't know what it is, and we don't know why it happened. But we do know that it hasn't moved and that it's still there with him. He's asked for his day in court, and the people of the State of Florida have given him several days in court. He has afforded himself of a system of justice that gives him the benefit of every reasonable doubt. You have been told and I concur that we have the burden. You have been told and I agree that when he came into this trial, he sat there, clothed in innocence, cloaked in white, having afforded himself of the system, having asked to have judgment passed by twelve people in the community. I ask you, when you file out of the courtroom and deliberate your verdict, is he still clothed in white?

The State has done everything that it can do under the system up until this point. You go out, you deliberate your verdict, and you walk back into this courtroom and you tell the Defendant and you tell Judge Federico and you tell the world what you have determined. I submit that if you carefully consider all of the evidence in this case, you'll walk back in with a conviction of guilty as charged of murder in the first degree, guilty as charged of kidnapping. If you do that, we'll reconvene, as we talked about in voir dire. The matter of sentencing ultimately rests with the

Court. But I ask you to consider the case carefully. When you come back into the courtroom, look at him, give him the justice that he demands of us. Give him the justice that he didn't give to Elisa Nelson. Thank you.

THE COURT: Before we hear the final argument of Ms. Schaeffer, we'll take a ten minute recess.

(THEREUPON, a short recess was taken.)

evidence. A well-connected chain of circumstances is as conclusive in proving a crime or fact, as is positive evidence. Its value is dependent upon its conclusive nature and tendency. Circumstantial evidence is governed by the following rules: One, the circumstances themselves must be proved beyond a reasonable doubt; two, the circumstances must be consistent with guilt and inconsistent with innocence; three, the circumstances must be of such a conclusive nature and tendency that you are convinced beyond a reasonable doubt of the Defendant's guilt or of the fact to be proved.

If the circumstances are susceptible of two reasonable constructions, one indicating guilt and the other innocence, you must accept that construction indicating innocence. Circumstances which, standing alone, are insufficient to prove or disprove any fact may be considered by you in weighing direct and positive testimony.

You are to disregard the consequences of your verdict. You are impaneled and sworn only to find a verdict based upon the law and the evidence. You are to consider only the testimony which you have heard, along with the other evidence which has been received, and the law as given to you by the Court. You are to lay aside any personal feeling you may have in favor

of, or against, the State and in favor of, or against, the Defendant. It is only human to have personal feeling or sympathy, in matters of this kind, but any such personal feeling or sympathy has no place in the consideration of your verdict. When you have determined whether the Defendant is guilty or not guilty, you have completely fulfilled your solemn obligation under your oaths.

An attorney has the right, and it is his duty, to interview witnesses for the purpose of learning what testimony they will give. The fact that a witness has talked to an attorney and may have told the attorney what he would testify to on the trial does not discredit the testimony of the witness.

Your verdict of finding the Defendant either guilty or not guilty must be unanimous. The verdict must be the verdict of each juror, as well as of the jury as a whole.

A separate crime is charged in each count of the indictment. Each crime and the evidence applicable to it must be considered separately. The fact that you may find the Defendant guilty or not guilty of one of the crimes charged must not affect your verdict with respect to the other crime charged.

Count I of the indictment charges the crime of

THE CLERK: Alisia P. Sickler, are these your verdicts?

MS. SICKLER: Yes.

THE CLERK: James L. Pendergraft, are these your verdicts?

MR. PENDERGRAFT: Yes.

THE CLERK: Margaret F. Swauger, are these your verdicts?

MS. SWAUGER: Yes.

THE CLERK: Alice Tresca, are these your verdicts?

MS. TRESCA: Yes.

THE CLERK: Michael Peter Lazor, are these your verdicts?

MR. LAZOR: Yes.

THE CLERK: Cusick P. Clow, are these your verdicts?

MS. CLOW: Yes.

THE COURT: Members of the jury, as you were informed at the outset of this case, if you should return a verdict of guilty of murder in the first degree, it would be necessary for you to render an advisory opinion to the Court with regard to the punishment the jury feels appropriate in this case. That phase of the trial will commence at nine o'clock tomorrow morning. You will remain sequestered for this evening. Trial will start promptly at that time. At

MR. DOHERTY: Number three just says that the jury recommendation is entitled to great weight.

THE COURT: Well, I think that goes without saying. I don't know if I need to instruct them that that is so.

MR. DOHERTY: I think it is. The reason we would ask --

THE COURT: That's something that I need to do after they make their recommendation, and I will give it great weight.

MR. DOHERTY: I know, but they need to know that so they know we're not up there just --

THE COURT: I think the standard instructions bring home to them that it is very important that they, you know, to not act hastily or without due regard to the gravity of these proceedings, that they should carefully weigh and sift and consider the evidence. I think that's sufficient. I will deny number three.

MR. DOHERTY: The next one is with regard to instructing the jury that they have a function that they are serving -- their function is to balance the aggravating and mitigating circumstances, that they are to give each aggravating mitigating circumstance the weight they think it deserves. I think that is not clear in the standard jury instructions. It sounds like

1 specials explaining the aggravating and mitigating
2 circumstances, when appropriate.
3 Some I won't ask for, I'm sure. Here's that top
4 blurb. Here is the first one I have asked for.
5 (THEREUPON, an off-the-record discussion was held.)
6 MR. MEISSNER: If I could see that also -- some
7 I won't have any problem with.
8 MS. SCHAEFFER: This will be two, for the Court.
9 This is one.
10 (THEREUPON, an off-the-record discussion was held.)
11 MR. MEISSNER: We don't have any objection to
12 special instruction number one.
13 THE COURT: You don't?
14 MR. MEISSNER: No.
15 THE COURT: All right. I'll give it, then, since
16 there is no objection from the State. That's granted.
17 I have a problem with number two. I don't really
18 understand its applicability.
19 MR. MEISSNER: I don't, either. I'm going to
20 interpose an objection to it.
21 THE COURT: I'll deny number two. I don't think
22 it's appropriate. That's for avoiding arrest.
23 MR. DOHERTY: Okay.
24 THE COURT: I'll deny that one. I'll give number
25 one.

appropriate place?

MS. SCHAEFFER: Number one, we said there should be added, that when you're giving A, B, C, D, E, F, G, then you should read that one as H, so that would go right in there.

THE COURT: I think all three of those could go right in there.

MS. SCHAEFFER: I think they probably could.

(THEREUPON, an off-the-record discussion was held.)

(THEREUPON, the following proceedings were held in open court.)

THE BAILIFF: Your Honor, the jury is in the jury room.

THE COURT: Bring the jury back, Mr. Devens.

THE BAILIFF: The jurors are in the jury box.

THE COURT: Thank you. Good morning, ladies and gentlemen. Members of the jury, you have found the Defendant guilty of murder in the first degree. The punishment for this crime is either death or life imprisonment. The final decision as to what punishment shall be imposed rests solely with the judge of this court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the Defendant. The State and the Defendant may now present evidence relative

to what sentence you should recommend to this Court. You are instructed that this evidence, when considered with the evidence you have already heard, is presented in order that you might determine, first, whether or not sufficient aggravating circumstances exist which would justify the imposition of the death penalty; and secondly, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any. At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

At this time, I will allow counsel a brief opening statement. Does the State wish to make one?

MR. HART: No, sir.

THE COURT: You're waiving?

MR. HART: Yes, sir.

THE COURT: The defense may make a brief opening statement.

MS. SCHAEFFER: All right. It's very important, before we begin this phase, that you understand the responsibility, the duties and ethics of a criminal defense attorney. I tell you this because you are now going to learn that throughout the beginning, or throughout the first phase of the trial, both Mr.

has been scarred by what this Defendant did to her? The Defendant's mother, his family, they are all victims. Donna Mann, a victim. They are victims only because they had contact with the Defendant. Every one of those individuals, Donna Mann, the Defendant's family, had an opportunity to come in under the protection of the law that every one of us in this courtroom stands ready to uphold; to sit in that witness stand and ask you to spare his life.

There are other victims in this case, the parents of Elisa Vera Nelson who have never had the opportunity to stand in front of anyone and ask to have their daughter's life spared. What I'm suggesting to you is that the ultimate responsibility for the imposition of the sentence rests with Judge Philip Federico. That is his sworn position in the system. He's heard everything you have heard. He may have the opportunity to learn more before he imposes a sentence. I think this community, as represented by this jury, should give to him the prerogative of imposing the death penalty, if that's what he ultimately feels is required in this case. Thank you.

MR. DOHERTY: If it please the Court, ladies and gentlemen of the jury, I want to thank you for the attention you have paid throughout the course of this

to have people coming to see him. So, I don't know which is worse, to tell you the truth. But as Mr. Doherty says, he has not forfeited his right to live any more than Elisa Nelson did. He is a sick man. You heard that from the psychiatrist. The man is sick. What causes a man to have an interest in little children, I don't know. I just don't know. I don't understand it. But apparently he does. He's sick. He's as sick as he can be. He deserves to be put away for the rest of his life, but a sick man does not deserve to be executed. He has not forfeited his right to live. Mr. Doherty and I implore you. This is the part I hate, because I don't like to beg anybody for anything, because I'm begging you with everything I have got, to spare his life.

THE COURT: I would ask that if anyone wishes to leave the courtroom, to please do so now and not during the Court's instructions to the jury.

These instructions, ladies and gentlemen, will take about ten minutes. If you wish to stand in place for a moment, that's fine before we begin.

Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed on the Defendant for his crime of murder in the first degree. As you have been told, the final

decision as to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law which will now be given to you by the Court and render to the Court an advisory opinion based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist. Your verdict should be based upon the evidence which you have heard while trying the guilt or innocence of the Defendant, and evidence which has been presented to you in this proceeding.

The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence: A, that the crime for which the Defendant is to be sentenced was committed while the Defendant was under sentence of imprisonment; B, that at the time the crime for which he is to be sentenced, the Defendant had been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person; C, that the Defendant in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons; D, that the crime for which the Defendant is to be

You are required to use a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. The procedure, therefore, shouldn't be viewed as a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances.

In order that you might better understand and be guided concerning the manner in which you should consider the enumerated aggravating circumstances, the Court instructs you that the aggravating circumstances specified in these instructions are exclusive. In deciding whether or not to recommend the death penalty, no other factor or circumstance may be used as an aggravating circumstance, although you may consider anything in mitigation and not just those previously enumerated by me. Aggravating circumstances must be established beyond a reasonable doubt before they may be considered by you in arriving at your decision. Proof of an aggravating circumstance beyond a reasonable doubt is evidence by which the understanding judgment and reason of the jury are well-satisfied and convinced to the extent of having a full, firm and abiding conviction that the circumstance has been proved to the exclusion of and beyond a reasonable doubt. Evidence

to have people coming to see him. So, I don't know which is worse, to tell you the truth. But as Mr. Doherty says, he has not forfeited his right to live any more than Elisa Nelson did. He is a sick man. You heard that from the psychiatrist. The man is sick. What causes a man to have an interest in little children, I don't know. I just don't know. I don't understand it. But apparently he does. He's sick. He's as sick as he can be. He deserves to be put away for the rest of his life, but a sick man does not deserve to be executed. He has not forfeited his right to live. Mr. Doherty and I implore you. This is the part I hate, because I don't like to beg anybody for anything, because I'm begging you with everything I have got, to spare his life.

THE COURT: I would ask that if anyone wishes to leave the courtroom, to please do so now and not during the Court's instructions to the jury.

These instructions, ladies and gentlemen, will take about ten minutes. If you wish to stand in place for a moment, that's fine before we begin.

Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed on the Defendant for his crime of murder in the first degree. As you have been told, the final

you to act hastily or without due regard to the gravity of these proceedings. Before you ballot, you should carefully weigh, sift and consider the evidence, and all of it, realizing that a human life is at stake, and bring to bear your best judgment upon the sole issue which is submitted to you at this time, of whether a majority of your number recommend that the Defendant be sentenced to death or to life imprisonment. Should a majority of the jury determine that the Defendant should be sentenced to death, you should recommend an advisory sentence as follows: "A majority of the jury advises and recommends to the Court to impose the death penalty upon the Defendant, Larry Eugene Mann." On the other hand, if after considering all the law and the evidence touching upon the issue of punishment, a majority of the jury determines that the Defendant should not be sentenced to death, then you should render an advisory sentence as follows: "A majority of the jury advises and recommends to the Court that it impose a sentence of life imprisonment upon the Defendant, Larry Eugene Mann." The law requires that seven or more members of the jury agree upon any recommendation, advising either the death penalty or life imprisonment. You will now retire to consider your recommendation; and when seven or more are in agreement as to what

advisory sentence which you have just heard read by the Clerk?

MR. LAZOR: I do.

THE CLERK: Do you, Cusick P. Clow, agree and confirm that a majority of the jurors joins in the advisory sentence which you have just heard read by the Clerk?

MS. CLOW: I do.

THE COURT: I would like to join Mr. Lazor in complimenting all of the attorneys who were engaged in the trial of this case in the excellent manner in which they tried the case and the professional ability and professionalism displayed by all counsel in this matter.

With regard to the jury, the Court realizes that jury service is an imposition to some extent upon all who are called to serve. It is particularly an imposition upon jurors who are required to be sequestered. However, the law is paramount. We certainly recognize your dedication and appreciate your cooperation during your week of jury service. You are now excused with the thanks of the Court, and your week of jury service is concluded. Thank you very much.

THE BAILIFF: The jury has left the courtroom.

THE COURT: The Court, as required by law, will give great weight to the recommendation of the jury and

APPENDIX B

Q You have seen them, haven't you?

A I have.

THE COURT: Anything else, Mr. Meissner?

MR. MEISSNER: No, Judge.

THE COURT: Anything else for the Defendant?

MR. DOHERTY: At this point, the defense would rest.

THE COURT: We'll take a ten minute recess, and then we'll commence final arguments to the jury.

(THEREUPON, a short recess was taken.)

THE BAILIFF: The jury is in the jury room, Your Honor.

THE COURT: Bring the jury back.

THE BAILIFF: The jury is in the jury box, Your Honor.

THE COURT: Thank you, Mr. Devens. Members of the jury, in this phase of the trial we'll have two final arguments: One from the State and one from the defense. Thereafter, the Court will instruct you on the law applicable and you will retire to deliberate your verdict. The State may proceed with its final argument.

MR. HART: I have never had an opportunity to address you throughout this trial. During voir dire, Mr. Meissner conducted the entire jury selection process. During closing, Mr. Meissner was the only one who had an opportunity to address you. He and I will each speak

to you. He will speak after I am finished, and Ms. Schaefer and Mr. Doherty will have an opportunity to speak with you.

First of all, I want to offer you my personal thanks for your diligence. Each of you during this trial -- I'm very satisfied that you have done service to the community; you have done justice by the victim in this case. You have seen diligently to the laws of this state, seen that they have been applied in a fair and consistent manner as required by the Constitution of this country and the state. I'm sure that each of you must feel very comfortable with the decision that you reached last evening. The judge is going to instruct you on what are called aggravating and mitigating circumstances. He is going to tell you, basically, that you have to assess or evaluate the aggravating circumstances in this case, weigh them against the mitigating circumstances in this case; and after looking at them individually, looking at them as a whole, balancing them out, you must make a decision. A decision is based on a majority vote, not like the decision of guilt or innocence, where everyone must agree. This decision and recommendation will be based on what a majority feels, given all the considerations under the law. The judge is going to talk about aggravating circumstances.

He is going to mention six or seven of them. I feel at this point in the trial that we're dealing with four of the seven; that is, that the Defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to a person. The State brought in from Texas the victim of this man's propensities as they existed in 1973. You saw Debra Johnson, you heard her testimony as to what she did to him. And interestingly enough, as far back as 1973, this man, even though he performed this sex act upon her, targeted and made mention of the fact that if she did not satisfy his desires, that the young -- I think she said a two year old boy that was crying and watching this going on, he would have been the target that he would have selected to satisfy his desires. Interestingly enough, I think if you go back to 1973, that the two year old boy today is around eleven years old, about the age of Elisa Vera Nelson.

Now, you have also considered the crime of kidnapping in this particular case. We know that we're dealing here with an individual who is a convicted burglar; who we absolutely know has committed a violent sex act upon another female in the community without question; and the community, meaning this country, and has threatened violence to a young two year old child

during the course of that transaction. We know that there was an incident back in 1969 involving a seven year old girl. Where she is today, I know not, but she is a twenty year old person living somewhere in this country. And I imagine if we had the records and the resources, we could go back and find her. We could give you the name of that victim. Let's just call her Jane Doe. We know the name of the '73 victim, Debra Johnson; and we know the name of the 1980 victim, Elisa Vera Nelson. What we don't know, if this man is ever eligible for parole, is who the victim will be in twenty-six years, possibly. It is apparent that the reason Elisa Vera Nelson was a victim, was because she witnessed or could have been the person that identified him as her abducter had she lived. That, I believe, is the second aggravating factor here. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. It is the State's contention that this murder was committed so that there would be no witnesses to the act that this man committed.

The fourth factor that this case obviously falls into is the capital felony was especially heinous, atrocious and cruel; and I want to talk about that for just a few moments. We did not show you everything

that was available. We can only show you those items that were permitted into evidence, those items which were found to be more relevant than inflammatory. I am not going to sit up here and spend a lot of time trying to get you enraged or pumped up over the murder of this girl, but there is no question based on the Medical Examiner's testimony that over half the body or over half the blood in the body of that girl pumped from her neck before she died. Where did it go? Well, we heard testimony that there were blots, I think, ten or twelve, up to eighteen feet away. There was a drip trail several feet away, and there were no drag marks. Let me suggest to you that it indicates that at some point, Elisa Vera Nelson was on the ground; that her hair was pulled back and her throat was slashed and that she tried to crawl away. She tried to get away, but obviously being a ten year old girl, she was unable to overpower this man or elude him under any circumstances, and that she literally crawled around on her hands and knees in that area trying to pull away from him, bleeding from the throat. Look at the clothes. Those clothes are not that badly stained. Had she been standing or upright, the blood from her neck would have covered her. Let me suggest to you that is what happened in this case. Let me also suggest that prior or at some point,

this man began to tie her up -- and I think, given the testimony you have heard in this case and the way this man is with children, that his intentions were to sexually molest her, but she was able to resist. He abandoned the effort; and when she tried to get away, he cut her throat. I can't show you a picture of Elisa Vera Nelson. This is not a picture of Elisa Vera Nelson. It's a picture of the body of Elisa Vera Nelson. Elisa Vera Nelson was gone at this time.

Let's reconstruct possibly what she did with her life. You've seen her mother. You've seen the young girl's hair, long, blond. You might imagine, based on a couple of pictures you have seen, she was a fair-complected, light-skinned young girl who had just got her braces when she was on the way to school. Let's leave it at that.

The last category is, the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. I believe this is abundantly applicable. What did this girl do? What could she conceivably have done to motivate or to call for this response? This is not a case where an enraged lover or an enraged husband went out to get his wife's lover, that there was some feeling of moral justification.

1 This was a girl who was on her way to school four miles
2 north of the home where the Defendant was at and had no
3 reason whatsoever to come in contact with this man.
4 Doctor Fireman, I think, made a couple of interesting
5 comments. I think that would indicate that the most
6 that this girl ever did to this man -- and I'm quoting
7 from him -- is, "She interrupted him." Doctor Fireman
8 said that he had set about or set in his mind a plan
9 that would result in his suicide. He had decided to
10 commit suicide before he committed the offense, but was
11 interrupted by the victim. Elisa Vera Nelson was
12 murdered because she interrupted the plans of the
13 Defendant. Is that moral or legal justification? It's
14 absurd. Doctor Fireman went on to say and describe the
15 young girl, and this was even more offensive, I think,
16 in light of everyone's common sense, that he lashed
17 out against, quote, "the provoking individual." Remember
18 those terms from Doctor Fireman, that he lashed out
19 against the provoking individual? And here she is.
20 She provoked this man. I think that flies in the face
21 of everyone's common sense. Elisa Vera Nelson did not
22 provoke anybody. Maybe from some sort of theoretical,
23 conceptual, psychological standpoint that's what she
24 is. But you know from your own common experience in
25 this community and with children that this is not a

provoking individual.

Talking about the atrociousness and the cruelty and the heinousness of this offense, I want to point out to you -- I don't think there is any question about that. Throughout the voir dire process, I remember Ms. Schaeffer and Mr. Doherty continually asked you if you would be so upset by gruesome photographs, grisly photographs, gruesome, ghastly, hideous -- all those words I recall being used by defense counsel to describe the photographs that you would see. Those words are the words of the statute: Heinous, atrocious and cruel. I don't think there is any question but that defense counsel has conceded to you in voir dire and throughout this trial the word they have chosen to describe the things that you have seen. These are and this is one of those crimes that is heinous, atrocious and cruel.

Some people say the death penalty should not be imposed because it doesn't deter others from committing a crime. I'm not concerned with that today. It doesn't affect me today. The State of Florida, the people of the state that Mr. Meissner and I work for are not concerned about deterring others today. Certainly if this was a side effect of the penalty that we could be assured of, we would be happy that it existed. But that

is not our purpose here today. We're asking that you recommend this man be given the death penalty to deter only one person in the world, and that's Larry Eugene Mann. I can't be concerned about the theory of whether or not somebody in years to come is going to be deterred by Mr. Mann's execution. I don't know if that's going to happen, and I don't want Mr. Mann executed for that reason. The State wants Mr. Mann put to death because the State cannot afford for this man to remain alive. We know of three victims. Doctor Fireman indicated in his testimony that he talked about other criminal episodes with the Defendant that we don't know about. This community cannot afford for this man to remain alive. This man does not deserve to remain alive; and if justice in this country is to have any value at all, it seems to me that the penalty that's given ought to in some way approach the crime that was committed.

This picture of this scene that you viewed with the body of Elisa Vera Nelson was the scene that was created by what exists in this man and what has existed in this man as far back as 1969, what existed in him from the day he went into Debra Johnson's home and what existed in what this young child died for not five months ago. I suggest to you that in the last eleven years, this man has not changed. We can sit around and

1 theorize and hope that somewhere in the future somebody
2 might come up with a cure. But as Ms. Schaeffer and Mr.
3 Doherty pointed out in some of their cross-examination
4 of some of the witnesses, maybe it will and maybe it
5 won't; and at this juncture, the evidence is so
6 overwhelming that this man is a murder waiting to
7 happen. There is another murder wrapped up in this man
8 right now and maybe more. And by your recommendation,
9 you're going to tell the judge that you as the conscience
10 of this community, you're going to tell him whether or
11 not you are willing to take the risk that at some point
12 in the future this man might be put out in the streets
13 and then be given the opportunity to find out if that
14 murder will occur. I implore you as the conscience of
15 this community to tell the judge to reflect your common
16 sense and what you know to be right in this case, to
17 recommend that Larry Eugene Mann be put to death in the
18 electric chair. Thank you.
19 MR. MEISSNER: Ms. Schaeffer has testified in this
20 portion of the trial and I have not. I will share with
21 you this morning that I have been involved in the
22 criminal justice system for about sixteen years, four
23 years as an FBI agent and twelve years prosecuting,
24 practicing law in this county. You are a part of the
25 criminal justice system that has existed in substantially

the same form you see it today for those sixteen years. What you have seen in this courtroom is but one notable failure of the system. When that judge sentenced Larry Mann to nine years in prison in the State of Mississippi for what he did, he expected Larry Mann to be kept for nine years away from society. Had the bureaucrats kept him for that period of time, had the law of the State of Mississippi required that he be kept for that period of time, we could not be here today. The state of the law today is that if he receives the death penalty -- if he receives life imprisonment, he must serve twenty-five years without parole. But you and I do not control the destiny of the future course of the law. I am not asking you to speculate upon that. I am simply asking you to consider that. How does the system effectively deal with the pathological killer? I don't know. If you think his life should be preserved as an object of medical science and research for individuals like Doctor Fireman to study and you think that's justification for imposing life imprisonment in this case, fine, recommend to the judge that that be done. Does it really make any difference, however, where Larry Mann is, whether he is alive in jail or whether he is out on the streets, if he is alive, he will have access to other human beings; and if he is

within reach of a human being, the next time the time bomb goes off and he has this uncontrollable urge, is there any doubt in your mind as to what the result will be? We don't have any effective way of dealing with this Defendant other than to say that we have had enough; you have been given enough opportunities. You cannot live among us any longer. This has been a long, laborious process that this Defendant has been exposed to, a lengthy and thorough police investigation, the charging process by twenty-three citizens, impartial citizens of this county, the discovery process in which two very competent and able attorneys represent him and represent his interests, a long trial period in which it should be obvious to you that throughout, he had the benefit of any doubt and was protected by the law of this state from having his rights trampled upon by the people of the state. That portion of the process is over, and the guilt which we knew about all along has been established now in the eyes of the law, because you were convinced beyond a reasonable doubt of his guilt. You obviously didn't know everything when you retired to determine his guilt. Elisa Nelson is the victim in this case and she's dead. Debra Johnson was a victim in 1973. And is there any doubt in any one of your minds that for as long as that woman lives, she

has been scarred by what this Defendant did to her? The Defendant's mother, his family, they are all victims. Donna Mann, a victim. They are victims only because they had contact with the Defendant. Every one of those individuals, Donna Mann, the Defendant's family, had an opportunity to come in under the protection of the law that every one of us in this courtroom stands ready to uphold; to sit in that witness stand and ask you to spare his life.

There are other victims in this case, the parents of Elisa Vera Nelson who have never had the opportunity to stand in front of anyone and ask to have their daughter's life spared. What I'm suggesting to you is that the ultimate responsibility for the imposition of the sentence rests with Judge Philip Federico. That is his sworn position in the system. He's heard everything you have heard. He may have the opportunity to learn more before he imposes a sentence. I think this community, as represented by this jury, should give to him the prerogative of imposing the death penalty, if that's what he ultimately feels is required in this case. Thank you.

MR. DOHERTY: If it please the Court, ladies and gentlemen of the jury, I want to thank you for the attention you have paid throughout the course of this

APPENDIX C

1 MR. DOHERTY: We have previously objected to a
2 viewing of the scene; we don't want to waive anything
3 by our failure to object here at the scene. So, for
4 that purpose, we are objecting to the view.
5 MS. SCHAEFFER: Of everything, of all five places.
6 We are at the first one now. Every place we'll go,
7 we'll object each time.
8 THE COURT: The objection is overruled.
9 The record should reflect that the Defendant has,
10 in fact, waived his presence at each of these jury
11 views.
12 MS. SCHAEFFER: That's correct.
13 MR. DOHERTY: That's correct.
14 THE COURT: Members of the jury, I would, once
15 again, ask you, please, not to talk amongst yourselves
16 in connection with this case. We'll be here briefly,
17 and we'll move on to another location.
18 Also, if you have any inadvertent contact with
19 anyone not involved in the case, please do not allow
20 them to say anything to you or in your presence at all.
21 Mr. Meissner?
22 Q (By Mr. Meissner) Officer Pondakos, you're still
23 under the oath that was administered back in the courtroom.
24 A Yes, sir.
25 Q As the case agent in this case, did you have

occasion to locate the home of the victim's parents and the [illegible] the victim was living on November fourth, 1980?

A Yes, sir. The address is 1930 Florida Avenue, Palm Harbor.

Q Are we at that location at this time?

A Yes, sir. 1930 Florida Avenue is the house locate right there beyond the trees.

Q The house to which the officer is pointing is the house where the victim's parents are now living in.

Officer Pondakos, is that located within the limits of Pinellas County, Florida?

A Yes, sir.

Q Now, based upon the investigation that was conducted and the reports you reviewed, are you aware of the location where Mrs. Underwood has testified and previously indicated she last saw the victim alive?

A Yes, sir, I'm familiar with that.

Q Can you take us and point out that location.

A That's correct, I can do that.

MR. MEISSNER: Your Honor, I request we now adjourn and move to that location.

THE COURT: Any questions in connection with this location?

MR. DOHERTY: Not at this time, Your Honor.

(THEREUPON, all proceedings were concluded until

all parties reached the next scene.)

THE COURT: Our jury is present.

Q (By Mr. Meissner), Officer Pondakos, would you point out for the jury the place where Mrs. Underwood explained to you was the last place she saw Elisa Nelson, please.

A It would most likely be in the area we're standing right now. This is Seventeenth Street and Nebraska Avenue. She was last seen at this intersection traveling toward the west.

Q What was her direction of travel?

A Toward the west.

Q West would be that way?

A Yes.

Q The sidewalk only on one side of the street would be on the south side of the street?

A That's correct, and the sidewalk goes from this location up to Nineteenth.

MR. MEISSNER: Do you have any cross-examination?

MR. DOHERTY: Not at this time.

MR. MEISSNER: I suggest we adjourn from here and go to the location where the bicycle was found.

THE COURT: All right. We'll do that.

(THEREUPON, all proceedings were concluded until all parties reached the next scene.)

Q (By Mr. Meissner) Officer Pondakos, go ahead, if you will, and explain to the jury where the bicycle was, and go ahead and generally describe how this area appeared back on that date, November fourth.

MS. SCHAEFFER: We object. I thought the idea was to show where the location was and nothing further.

MR. MEISSNER: While we're here, I thought that we could explain if there was anything different about this location.

THE COURT: Let's pinpoint where this is.

THE WITNESS: The bicycle was located -- Elisa's bicycle was located about right where I'm standing. It was tilted over and in the brush.

Q (By Mr. Meissner) I'm going to show you what's been marked as State's Exhibit Ten in evidence. Can you identify that photograph?

A This is the bicycle that was later identified as belonging to Elisa Nelson.

Q Okay. Was that bicycle appearing in that photograph in the spot you're now standing?

A Right.

Q Is there anything different about that spot than it appeared the day that photograph was taken, on the fourth of November?

A This entire area that is cleared, that you see

clear here, resembled more like that area there than it does [redacted] all heavy brush.

[redacted] area where you identified the bicycle as being [redacted] over here, as resembled now is not the same as it was when it was photographed?

A When it was photographed, this entire area was -- it resembled the area behind me. This was all covered with heavy brush, and the bicycle was laying in the bushes.

Q Officer Pondakos, over here to the right, I notice a house under construction. Did you note that house or the construction of that house on November fourth?

A Yes. The house that we're looking at now is [redacted] the same condition or the same general condition, construction-wise, as it was back on November fourth, 1980.

MR. MEISSNER: I don't have anything further.

MR. DOHERTY: We have nothing at this time.

MR. MEISSNER: At this time, we'll move to the scene where the body was located.

(THEREUPON, all proceedings were concluded until all parties reached the next scene.)

THE COURT: All right. I think we can proceed.

Q (By Mr. Meissner) Officer Pondakos, would you please mark the spot where the body was located.

A Elisa's head was situated in this little hole.

Q Speak this way, please.

A The victim's head was situated in this hole right here. Right now, there are leaves in it, but her head was in here. The rest of her body came back this way, right about here. She was face down, one arm behind her back, one almost underneath the front of her.

MR. MEISSNER: Okay. Susan, if you would come over here and take a look at this. I want to get him to identify the scene in the picture. I just need one of those; whichever you think is most accurately going to give them a good shot of the position. I have a couple of them here. I want to get the angle right.

Let the record reflect, Judge, I have shown defense counsel two photographs out of what's been marked for identification as State's Exhibit Five. I'm going to have the Clerk mark those Five-A and Five-B. Excuse me, Five-D and Five-E.

THE COURT: Very well.

MR. MEISSNER: I'll let Officer Pondakos look at the photographs and orient the body and the items laying next to the body. Then I will publish that to the jury so that they can get a visual picture of exactly where the body was situated while they are here, Judge.

THE WITNESS: I can identify --

THE COURT: Let's move around a little bit. We're blocking the view of some of the jurors.

THE WITNESS: These are the photographs that were [illegible] the day that Elisa's body was found in its [illegible] position prior to any crime scene investigation being conducted. There is an item in one of the photographs, Five-E, next to her body which is a galvanized pipe pole with a rather large chunk or piece of concrete attached to it. This item was located next to Elisa's head.

As I indicated earlier, her head was right here, but the pole with the chunk of concrete was right here with the pole extending back this way. That's pictured in this photograph.

Q (By Mr. Meissner) Where would the photographer have been standing, what angle, to take that photo, so we can orient the jury?

A About where I'm standing right now.

MR. MEISSNER: If the jury could move around, I would like to publish that photograph.

THE COURT: Move the jury around this way.

MR. MEISSNER: Yes, if they could stand where the photographer was then.

With the Court's permission, if you would allow me to publish the photograph. Let one of the jurors take it and then pass it around.

THE COURT: Hand that to the juror on the end,

please.

Q (By Mr. Meissner) Officer Pondakos, you have another photograph that's marked Five-D. Would you explain the position of the photographer when that photograph was taken, please.

A The position of the photographer in this picture, which also is of Elisa Nelson, would be standing right about where I am now, taking a picture back towards the east. It shows Elisa in the original position prior to any crime scene investigation, face down, left hand behind the back, as she was found.

MR. MEISSNER: I ask permission to publish it.

THE COURT: You can publish it.

(THEREUPON, the exhibit was published to the jury.)

Q (By Mr. Meissner) Agent Pondakos, if you would, is there any difference in the general physical characteristics in this area today from the way it appeared on the day that the body was discovered?

A Yes, the total area has been more or less mowed down and cut. The area behind Mr. Hart, for example, was at least chest level or higher and much more thicker from this point -- correction -- from the point where the leaves end out to the dirt road. The section where the leaves begin, almost in a circular manner, coming all the way around by the jury and back this way, was all solid leaves

on the ground, such as is right here. We had to actually dig through the leaves to get to Flisa's body in an attempt to develop any kind of evidence.

Q All right. Officer, the jury has heard some testimony concerning a crime scene search in the immediate area of the body. You were here on that day when that was done; is that correct?

A That's correct.

Q And you supervised that crime scene, sir?

A That's correct.

Q Would you demonstrate to the jury the boundaries within which that crime scene search was conducted by the technicians here at the site, please.

A The area --

MR. DOHERTY: At this point, we would object as we have objected previously, for eliciting testimony at the scene. We think any testimony that should be elicited should be elicited in the courtroom where we can properly cross-examine the person.

MR. MEISSNER: I don't think this in any way inhibits their ability to cross-examine, and it certainly gives the jury a more accurate picture of exactly what was done out here.

THE COURT: All right. How much further? Are you just requesting that this would be --

MR. MEISSNER: I want him to go into this and [illegible] where the glasses were located and where the tire tracks were.

THE COURT: I'll overrule the objection. Go ahead, Officer.

THE WITNESS: The area that we searched was immediately adjacent to the body, the area where the leaves covered the ground. This search was conducted more or less on hands and knees trying to separate leaves, trying to reveal some evidence, anything of evidentuary value. That would have been the type of search that we conducted around this tree and the leafy area.

The other search in the immediate area to this area here was more or less just walking through and doing the best we could, considering the terrain that we had to deal with. As I indicated, you could barely even see your shoes from where you were walking. And the deputies or detectives assigned to that search were trying to turn up anything they could actually find.

Q (By Mr. Meissner) Officer, the jury has received testimony from Lieutenant Steigler concerning the retrieval of the eyeglasses. Can you show us where those eyeglasses were when you responded to the scene out here.

A Okay. This area where I'm standing is the general

area where the glasses were found. We measured it to be approximately sixty feet from where the glasses were found to where the body was located.

Q Okay. Would you move now to the general area of the tire tracks from which the plaster casts were made.

MR. MEISSNER: Can we go ahead and move the jury on down this way, please.

THE COURT: All right.

Q (By Mr. Meissner) Continue, please.

A We observed the set of tire tracks coming from this general area right where I'm standing, going out back toward the east, which would have been back out on County Road 39. The tire tracks were lifted or plastered by Technician Rothwell. They were actually lifted in the area where I'm standing now, which would give a fresh print.

The area right here was also sandy area. It wasn't as grassed-in or leaved-in as you see now, but the tracks came out this way and right back out to County Road 39. Those were the ones plastered by Technician Rothwell.

Q Was there any indication of a vehicle having been stuck back here or of tire slippage?

A That was pointed out to me, but I couldn't determine that.

Q Okay. You don't know what would have caused the configuration?

A I wouldn't have known what would have caused it. [illegible] have indicated that goes back out to County [illegible] Does that road extend further north?

A County Road 39 is an extension of Nineteenth Street, which is the street we were on, which eventually goes out to Highway 19 and also into Spanish Trails -- not Spanish Trails -- Spanish Oaks Subdivision.

MR. MEISSNER: Do you have any questions?

MR. DOHERTY: Not at this time.

THE COURT: All right.

MR. MEISSNER: Okay. We will move on, then, [illegible] the home where the Defendant was living at the time.

(THEREUPON, all proceedings were concluded until all parties reached the next scene.)

Q (By Mr. Meissner) Officer Pondakos, would you point out for the jury the house the Defendant was living in at the time of this offense.

A The Defendant was living at 1388 Winding Brook Way.

Q And is this the same house that you searched some days subsequent to the murder pursuant to court order?

A That's correct. On November the eighth, we conducted a search warrant on the house and the truck which was in the garage at this residence.

Q Are you familiar with the location of Cheryl

Osborne's house?

Yes, sir. Her house is directly across the street.

MR. MEISSNER: Do you all have any questions?

MR. DOHERTY: Not at this time.

Q (By Mr. Meissner) Does this house appear to be substantially the same now as it was on that date?

A Yes, sir.

MR. MEISSNER: That's it.

THE COURT: Does that conclude the jury view?

MR. MEISSNER: Yes.

THE COURT: If I could see counsel here for just a moment before we go back.

(THEREUPON, an off-the-record discussion was had.)

(THEREUPON, all proceedings were concluded until all parties reached the courthouse.)

THE BAILIFF: The jury is in the jury room, Your Honor.

THE COURT: Anything before we bring the jury in? Bring the jury in, Mr. Devins.

THE BAILIFF: The jurors are in the jury box, Your Honor.

THE COURT: All right. Mr. Meissner?

He has been sworn, Mr. Devins. Have him take his seat.

Q (By Mr. Meissner) Agent Pondakos, when did you

APPENDIX 3

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Docket No. 86-3102

LARRY EUGENE MANN,

Petitioner-Appellant,

versus

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

EN BANC REPLY BRIEF OF APPELLANT

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Preference: Habeas Corpus, Rule 11, App. 1(a)(3), En Banc

PRELIMINARY STATEMENT

References to the district court follow the procedure authorized by this Court, i.e., "R (Vol. #) - (Doc. #) - (Page #). "References to the trial transcript and the record on appeal of Mr. Mann's trial in the Circuit Court for the Sixth Judicial Circuit, in and for Pinellas County, Florida, are cited "ROA - (Page #)." All other citations are self-explanatory or are otherwise explained.

Mr. Mann amends his Certificate of Interested Persons to include Billy H. Nolas, Mr. Mann's counsel before the panel and now co-counsel to Dean D'Alemberte, as an interested party.

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STATEMENT OF ISSUES PRESENTED

I. Whether systematic comments by the trial judge and prosecutor throughout the course of the proceedings resulting in Mr. Mann's sentence of death diminished the jurors' sense of responsibility for the capital sentencing task that they were to perform, in violation of Caldwell v. Mississippi and the eighth and fourteenth amendments?

II. Whether Mr. Mann's involuntary absence from a jury view conducted during the course of his capital trial at which important testimony was taken from the lead investigative detective violated the Confrontation Clause and the sixth, eighth, and fourteenth amendments?

III. Whether the death sentence imposed on Mr. Mann in substantial reliance on an unconstitutional prior conviction violates the eighth and fourteenth amendments?

IV. Whether Mr. Mann's sentence of death violates Doyle v. Ohio and the fifth, sixth, eighth, and fourteenth amendments because it was based on a recommendation of death obtained from a jury which was told that Mr. Mann "showed" no remorse after a post-arrest, post-Miranda warnings invocation of his right to silence?

V. Whether the failure of the court during the sentencing phase of the trial to give a requested jury instruction that the jury could properly consider absence of flight as a mitigating factor constitutes a violation of the eighth and fourteenth amendments?

VI. Whether the failure of the jury form to indicate whether the conviction was based upon a finding of actual intent on a premeditation theory, or merely imputed intent on a felony murder theory, coupled with the failure of both the trial court and the appellate court to make a finding of actual intent, renders the sentence of death invalid under the eighth amendment?

ARGUMENT

I

SYSTEMATIC COMMENTS BY THE TRIAL JUDGE AND PROSECUTOR THROUGHOUT THE COURSE OF THE PROCEEDINGS RESULTING IN MR. MANN'S SENTENCE OF DEATH DIMINISHED THE JURORS' SENSE OF RESPONSIBILITY FOR THE CAPITAL SENTENCING TASK THAT THEY WERE TO PERFORM IN VIOLATION OF CALDWELL V. MISSISSIPPI AND THE EIGHTH AND FOURTEENTH AMENDMENTS

A. The True Role Of A Florida Capital Sentencing Jury

The Attorney General's brief informs us that in Florida

> [t]he jury plays no role in the determination of whether a defendant is death qualified.

(En Banc Brief of Respondent/Appellee ["State's Brief"], p. 33.)

We are also told that

> Tedder [v. State] has nothing to do with the jury's role

Id. at p. 37, and that

> [t]he jury's role, vis a vis Tedder, is nothing more than a gratuitous granting of mercy to a death qualified defendant.

Id. at p. 38. The capital sentencing scheme which the State's brief discusses at great length is assuredly not Florida's post-Furman scheme. The Florida Supreme Court would certainly not recognize the State's characterization; that Court has, in fact, recently instructed the State on the subject:

> The state . . . suggests that the override was proper here because the trial court judge is the ultimate sentencer and his sentencing order represents a reasonable weighing of the

> relevant aggravating and mitigating circumstances. According to the state's theory, this Court should view a trial court's sentencing order with a presumption of correctness and, when the order is reasonable, this Court should uphold the trial court's sentence of death. We reject the state's suggestion. Under the state's theory there would be little or no need for a jury's advisory recommendation since this Court would need to focus only on whether the sentence imposed by the trial court was reasonable. This is not the law. Sub judice, the jury's recommendation of life was reasonably based on valid mitigating factors. The fact that reasonable people could differ on what penalty should be imposed in this case renders the override improper.

Ferry v. State, 507 So. 2d 1373, 1376-77 (Fla. 1987)(emphasis supplied). The Florida Supreme Court has told us that the jury's role is critical:

> Appellant's eighth point is that the trial court erred in giving the jury's recommendation of death greater weight than that to which it was entitled. In instructing the jury, the trial court stressed that the jury recommendation could not be taken lightly and would not be overruled unless there was no reasonable basis for it. In its sentencing order the judge noted he was imposing the sentence "independent of, but in agreement with" the jury recommendation. There is no error; this is the law. It is appropriate to stress to the jury the seriousness which it should attach to its recommendation and, when the recommendation is received, to give it weight. To do otherwise would be contrary to Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), and Tedder v. State, 322 So.2d 908 (Fla. 1975).

Garcia v. State, 492 So. 2d 360, 367 (Fla. 1986)(emphasis

supplied). The jury's crucial role is a matter which has been established for well over a decade:

> [I]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

> [T]he recommended [death] sentence of a jury should not be disturbed if all relevant data was considered.

LeDuc v. State, 365 So. 2d 149, 151 (Fla. 1978).

This Circuit's precedents also recognize that the system the State's brief talks about has not existed since Furman. See Adams v. Wainwright, 764 F.2d 1356, 1365 (11th Cir. 1985)(Under Florida law the "jury's role in [the] advisory sentencing process is critical."); Adams v. Wainwright, 804 F.2d 1526, 1530 (11th Cir. 1986), modified sub nom., Adams v. Dugger, 816 F.2d 1433 (11th Cir. 1987)("[t]he jury's role in the Florida sentencing process is so crucial that dilution of its sense of responsibility for its recommended sentence constitutes a violation of Caldwell"); see also Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987).

The State's brief, however, takes us back in time and describes what the role of a Florida capital jury was before Furman v. Georgia, 408 U.S. 238 (1972). Under that statute (Fla. Stat. section 775.082(1) (1971)) the jury's role was indeed

"nothing more than a gratuitous granting of mercy to a death qualified defendant." (State's Brief, p. 38). Florida's Legislature and Supreme Court have long rejected the view which the State's brief now advances. The jury's role is central and critical.[1]

Thus, because "a [Florida capital] defendant has the right to an advisory opinion from a jury," Floyd v. State, 497 So. 2d 1211, 1215 (Fla. 1986), because the jury's recommendation carries great weight, Tedder, supra, and because "a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process," Riley, supra, 12 F.L.W. at 458, the Florida Supreme Court has told us that

> improper, incomplete or confusing instructions relative to the consideration of both statutory and nonstatutory mitigating evidence does violence to the sentencing scheme and the jury's fundamental role in that scheme. . . . If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would

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[1] See Adams v. Wainwright, 764 F.2d at 1365; Tedder v. State, 322 So. 2d at 910; see also Brookings v. State, 495 So. 2d 135 (Fla. 1986); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Ferry v. State, 507 So. 2d at 1476-77; Garcia v. State, 492 So. 2d at 367; Fead v. State, No. 68,341 (Fla. September 3, 1987). The Florida Supreme Court has emphasized the jury's critical role time and time again. See, e.g., Riley v. Wainwright, 12 F.L.W. 457 (Fla. 1987); Downs v. Dugger, 12 F.L.W. 473 (Fla. 1987); Thompson v. Dugger, 12 F.L.W. 469 (Fla. 1987); Morgan v. State, 12 F.L.W. 433 (Fla. 1987); Lucas v. State, 490 So. 2d 943 (Fla. 1986).

> be distorted. . . . If the jury's recommendation, upon which the judge must rely, result[ed] from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure.

Riley, 12 F.L.W. at 458-59 (emphasis supplied)(citations omitted).

The "jury's fundamental role" in the Florida death penalty scheme is simply undeniable. The sentencing judge, in fact, "must rely" on the jury's recommendation. The Florida Supreme Court recognized as much even before Tedder, see Lamadline v. State, 303 So.2d 17, 20 (Fla. 1974), and, contrary to the State's brief's assertions, the sentencing judge must give deference to a jury recommendation of life as well as a jury recommendation of death. LeDuc v. State, 365 So. 2d 149, 151 (Fla. 1978); Stone v. State, 378 So. 2d 765, 773 (Fla. 1980); Chambers v. State, 339 So. 2d 204, 208-09 (Fla. 1976)(England, J., concurring).[2]

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[2] Curiously, the State cites LeDuc for the proposition that "a jury recommendation of death [has] no impact on the trial court's determination that death is appropriate." (State's Brief, p. 27). LeDuc in fact says just the opposite -- in reviewing a death sentence imposed by a trial court after a jury recommendation of death, the LeDuc court held:

> The primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the

(footnote continued on following page)

However, even if the State correctly asserted that a jury's death recommendation was essentially meaningless, Caldwell v. Mississippi would nevertheless apply to Florida, and Mr. Mann would still be entitled to relief:

> [t]he important consideration is not whether a presumption of correctness attaches to a recommendation of death, but whether the judge's statements made it less likely that a life sentence would be recommended.

Adams, 804 F.2d at 1530 n.3. Consequently,

> [e]very error . . . which makes it less likely that the jury will recommend a life sentence . . . deprives the defendant of the

(footnote continued from preceding page)

> recommendation. On the record placed before the jury in this case, a recommended sentence of death was certainly reasonable. Indeed, the only data on which a life recommendation could have been made would have had to be grounded on the nonevidentiary recommendation of the prosecutor and the emotional plea of defense counsel.

365 So. 2d at 151, citing Tedder v. State (emphasis added).

Similarly, in Stone v. State, supra, the Court discussed a challenge to a death sentence imposed after a jury death recommendation. The appellant grounded his challenge on a similar case, Swan v. State, 332 So. 2d 485 (Fla. 1975), in which the Florida Supreme Court had reversed the death sentence. In affirming Stone's sentence, the Court pointed out the critical difference between Stone's case and Swan's:

> Swan's jury recommended mercy while Stone's recommended death and the jury recommendation is entitled to great weight. Tedder v. State, 322 So.2d 557 (Fla. 1975).

Stone, 378 So. 2d at 773. Death or life, a Florida sentencing jury's vote must be given deference.

> protections afforded by the presumption of correctness that attaches to a jury's verdict recommending life.

Adams v. Wainwright, 764 F.2d at 1364. The State's efforts to make a Florida jury's sentencing role appear meaningless are simply untenable.

B. Caldwell v. Mississippi Applies In Florida

Because a Florida sentencing jury's recommendation is entitled to "great weight," the "risk that a capital sentence could be imposed without anyone making the calculations and deliberations required for the imposition of a capital sentence," (State's Brief at 32), which the State refers to as the "bottom line" of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985)(State's Brief at 32), assuredly demonstrates that Mr. Mann is entitled to relief. Mr. Mann's jury was repeatedly informed that they had no responsibility for sentencing, that the decision "was not on their shoulders," that it rested "solely" with the judge, that the judge would have "the opportunity to learn more before he impose[d] a sentence" (ROA 2439), and that they "should give to him the prerogative of imposing the death penalty, if that's what he ultimately feels is required . . ." Id.[4] Yet the

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[4] Mr. Mann's jurors were in fact more egregiously misled than those in Caldwell. Here the prosecutor, sanctioned by the judge's instructions, [mis]informed them that only by voting for death would they assure that the judge would make a fair sentencing determination after considering all the factors --

(footnote continued on following page)

law obligated the judge to defer to the jury's verdict, and after the jury finished all of its work, the sentencing judge himself stated that he would give "great weight" to the jury's recommendation (See ROA 2464). Of course, the jury never heard this.

In Mr. Mann's case the prosecutor's "uncorrected suggestion that the responsibility for [the] ultimate determination of death [would] rest with [the judge]," Caldwell, 105 S.Ct. at 2641-42, a suggestion then confirmed by the judge's instructions, intolerably allowed the jury to "minimize its role." Id. If the judge followed Florida law, as he said he would, he gave deference to a verdict returned by jurors whose role had been minimized (ROA 2464). See Tedder v. State, supra. The Florida Supreme Court's limited "proportionality" review then deferred to the jury and the judge. The risk that the "players fail[ed] to catch [the] ball because each believe[d] the other [would] make the catch" (State's Brief, p. 32) is precisely what Mr. Mann's case is about.

The State, however, profoundly misperceives the issue. The constitutional infirmity in Caldwell was not the failure of the court to inform the jury of the presumption of correctness to

(footnote continued from preceding page)

including secret factors which he would learn about but which the State had not been allowed to tell the jury. However, a life recommendation, according to the prosecutor, would tie the judge's hands.

which their sentencing decision was entitled in the appellate court; rather, the Eighth Amendment violation stemmed from the fact that the prosecutor informed the jury that their decision would be reviewed by a more qualified authority (a higher court), thereby signalling them that any error would be corrected and that the ultimate sentencing responsibility rested elsewhere. Caldwell, 105 S.Ct. at 2638, 2641-42. This is also the constitutional infirmity in Mr. Mann's case -- in fact, here the unreliability of the jury's verdict is even greater, for the jurors were told that the better qualified authority (the judge) would learn things about the defendant that they were not allowed to know. (See, e.g., ROA 2439). The State nevertheless mischaracterizes Mr. Mann's claim as a challenge to the trial court's failure to instruct the jury regarding the "great weight" to be given their decision under Tedder. (See, e.g., State's Brief, pp. 37, 38, 41, 46, 46A). This is inaccurate.

As in Caldwell, the Eighth Amendment was offended in Mr. Mann's case not by the Court's failure to instruct the jury regarding "great weight." Rather, the Eighth Amendment here was abrogated by the prosecutor's and the trial court's diminishing of the jury's true responsibility at sentencing (e.g., "not on your shoulders" [ROA 1218-19]; "[the] decision rests up here with the law, with Judge Federico" [ROA 1218]; "[h]e may have the opportunity to learn more before he imposes a sentence" [ROA

2439]; "give to him the prerogative" [ROA 2439].)

Curiously, the State never discusses, nor even mentions, the many egregiously misleading prosecutorial comments at issue in this case, comments which the court adopted in its instructions to the jury. Nowhere does the State discuss the prosecutor's continued exhortations to the jury that they had nothing to do with sentencing, that it was not their responsibility, that it was "not legally on [their] shoulders" (ROA 1218-19 [emphasis supplied]; see also ROA 1216, 1217, 1218, 1363, 2272-73).

Neither does the State ever mention the fact that the prosecutor affirmatively encouraged the jury to turn over to the judge any responsibility they may have felt for sentencing; the State never mentions the exhortation to let the judge decide because he would learn things the jury was not allowed to know (ROA 2439). The State never discusses the fact that those comments were part and parcel of the prosecutor's efforts to obtain a death recommendation by exhorting the jury to rely on the most improper of factors. See generally Initial En Banc Brief of Appellant, pp. 21-22 n.16 and accompanying text. Nor does the State's brief ever address the fact that the court's instructions to the jury echoed the State's responsibility-diminishing theme (see ROA 2344, 2361, 2453-54). Finally, the State's brief gives us no clue as to why we should consider Mr. Mann's sentence

reliable. This is not surprising: given the prosecutor's comments and the judge's sanctioning instructions in this case, the State simply cannot show that the statements had "no effect" on the jury's sentencing verdict. Caldwell, 105 S.Ct. at 2646; Adams v. Wainwright, 804 F.2d at 1531.

Not once does the State try to explain why the comments did not affect the jury. The comments did have an effect. Caldwell; Adams; Dutton v. Brown, 812 F.2d 593 (10th Cir. 1987) (en banc). The facts cannot be ignored. Mr. Mann is entitled to the relief he seeks.[5]

C. Mr. Mann's Claim Is Not Procedurally Barred

The State tells us that Mr. Mann's Caldwell v. Mississippi claim is not "novel" because the Florida Supreme Court has not considered it a "novel" claim (State's Brief at 7, passim). But the State ignores the fact that the adequacy and independence of any asserted state procedural bar, as well as the question of cause and prejudice, are all federal issues to be determined by federal standards.[6]

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[5] Mr. Mann had the right to a reliable jury sentencing recommendation. The prosecutor and judge arbitrarily deprived him of that right. For this reason too he is entitled to relief. See Hicks v. Oklahoma, 447 U.S. 343, 347 (1980); Vitek v. Jones, 445 U.S. 480, 488 (1980).

[6] See Wainwright v. Sykes, 433 U.S. 72, 87 (1977); Spencer v. Kemp, 781 F.2d 1458 (11th Cir. 1986)(en banc); Amadeo v. Kemp, 773 F.2d 1141 (11th Cir. 1985); see also County Court of Ulster County v. Allen, 442 U.S. 140 (1979); Henry v. Mississippi, 379 U.S. 433 (1965); Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986).

Caldwell announced a substantial change in Eighth Amendment jurisprudence. See Adams v. Dugger, supra, 816 F.2d at 1494-98. See also Dutton v. Brown, supra, 812 F.2d at 596. In fact, Caldwell represents a "substantial change" in Eighth Amendment law which went far beyond the change announced in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), for whereas Hitchcock only changed the "standard of review" under which recognized constitutional claims were determined,[7] Caldwell established a class of constitutional claims which did not previously exist:

> None of the [pre-Caldwell Eighth Amendment] cases indicated that prosecutorial comments or statements by a trial judge to the jury, other than those that limited the mitigating factors that could be considered, implicated the Eighth Amendment prohibition against cruel and unusual punishment.

Adams v. Dugger, 816 F.2d at 1499. Nevertheless, inconsistently, the Florida Supreme Court has held Hitchcock to be a "change in law" cognizable in state post-conviction proceedings, Thompson, supra; Downs, supra, while rejecting the view that Caldwell is such a change in law.

This will not do -- if any claim falls squarely within the rubric of the Witt v. State, 387 So. 2d 922 (Fla. 1980), analysis, Caldwell assuredly does. See Adams v. Dugger, supra. The

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[7] See Thompson v. Dugger, 12 FLW 469 (Fla. 1987)(Hitchcock rejected "mere presentation" standard of review applied to Lockett v. Ohio, 438 U.S. 586 [1978], issues); Downs v. Dugger, 12 FLW 473 (Fla. 1987)(same).

procedural bar asserted by the State is simply not independent and adequate:

> Caldwell . . . is the very type of claim for which Florida created the Rule 3.850 procedure. See Witt, 387 So.2d at 927 (genesis of Rule 3.850 procedure was Florida's desire to provide a mechanism for petitioners to raise challenges based on major constitutional changes in the law "where unfairness was so fundamental in either process or substance that the doctrine of finality had to be set aside"). Therefore, the Florida Supreme Court's holding that Adams' Caldwell claim is barred for failure to raise it on direct appeal either must rest on an incorrect determination as to the applicability of Caldwell, or represents application of a procedural bar with regard to a type of claim that Florida does not regularly and consistently bar. See Ake v. Oklahoma, 470 U.S. 68, 74-75, 105 S.Ct. 1087, 1092-93, 84 L.Ed.2d 58 (1985) (when application of state procedural bar depends on an antecedent ruling as to whether federal constitution error has been committed there is no independent and adequate state law ground); Spencer, 781 F.2d at 1470 (state procedural rule that is sporadically applied is not independent and adequate state ground).

Adams v. Dugger, 816 F.2d at 1497.

Moreover, by now there can be no doubt that Caldwell's novelty is sufficient to establish "cause":

> Further, we find that Adams has established cause and prejudice for any procedural default resulting from his failure to raise this claim on direct appeal. When "a constitutional claim is so novel that its legal basis is not reasonably available to counsel" at the time of a petitioner's procedural default, the petitioner has cause for the failure to raise the claim in

accordance with the state procedural rule. Reed v. Ross, 468 U.S. 1, 16, 104 S.Ct. 2901, 2901, 2910, 82 L.Ed.2d 1 (1984).

Adams, 816 F.2d at 1497. Caldwell is precisely the "novel" type of claim which was the Supreme Court's concern in Reed v. Ross. See Adams v. Dugger, supra; Dutton v. Brown, supra, 812 F.2d at 596; McCorquodale v. Kemp, No. 87-8724 (11th Cir., Sept. 20, 1987).

Under federal standards, Mr. Mann has established "cause". Prejudice, of course, is established "when [a petitioner] presents a meritorious Caldwell claim." Adams v. Wainwright, 804 F.2d at 1531 n.7.[8] Mr. Mann's claim is certainly meritorious.[9]

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[8] The interests of justice also demonstrate that Mr. Mann is entitled to relief and also show the substantial prejudice which Mr. Mann has suffered. But here, too, the State misses the point. The jury minimizing comments in this case "serve[d] to pervert the jury's deliberations concerning the ultimate question of whether in fact [Larry Eugene Mann should be sentenced to die]". Smith v. Murray, 106 S.Ct. 2661, 2668 (1986). In this context, no Sykes bar can apply. Smith v. Murray, supra.

[9] The State, as expected, relies on Pait v. State, 112 So.2d 380 (Fla. 1959) to argue that Mr. Mann's claim is not "novel" (State's Brief, p.8). Pait, a pre-Furman state-law decision, involved the reversal of a conviction pursuant to the Florida Supreme Court's exercise of authority akin to federal circuit court supervisory power. It had nothing to do with the Eighth Amendment. Of course, "[t]he mere fact a practice may be condemned as a matter of state law does not indicate that it is also an Eighth Amendment violation." Adams, 816 F.2d at 1499 n.6.

II

MR. MANN WAS DENIED HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WHEN THE TRIAL COURT CONDUCTED CRITICAL PROCEEDINGS AND ALLOWED IMPORTANT TESTIMONY TO BE TAKEN WHILE MR. MANN WAS INVOLUNTARILY ABSENT, AND THE DISTRICT COURT ERRED IN FAILING TO CONDUCT AN EVIDENTIARY HEARING ON THIS CLAIM

The State's brief cavalierly asks, "If there is a discussion of the merits, please tell respondent what the Florida Supreme Court said about the merits of the defaulted issues [?]" (State's Brief, p.15). What the State omitted from its brief's various quotes to the state-court opinions in this case provides an answer:

> In conclusion, we are satisfied that this was a well and conscientiously tried case by counsel, the trial judge and the jury.

Mann v. State, 482 So. 2d 1360, 1362 (Fla. 1986); see also id. at 1362 ("A comparison of the original trial record clearly and conclusively refutes any claim that there was any constitutional infirmity in the trial. The same is true of the appellate process. Although Mann urges vehemently numerous grounds for habeas corpus relief, each is either refuted or is insufficient for relief.") If this language does not demonstrate that the Florida Supreme Court ruled on the merits, we have lost the Great Writ's role as an instrument for vindication of federal rights. The State's effort to have this Court "apply state procedural rules as though it stood in the state court's shoes," Euell v.

Wyrick, 675 F.2d 1007, 1008 (8th Cir. 1982), is countenanced by neither policy nor the Constitution. See also Ulster County v. Allen, 442 U.S. at 155; Spencer v. Kemp, supra; Oliver v. Wainwright, 795 F.2d 1524, 1528-29 (11th Cir. 1986); Walker v. Engle, 703 F.2d 959, 966 (6th Cir. 1983)("Sykes rule does not apply when it is not clear that the state appellate court has applied a procedural bar" [emphasis in original]); Campbell v. Wainwright, 738 F.2d 1573, 1577 (11th Cir. 1984)(same).

After all, "[i]t is not too much to require the state court to be explicit when applying its procedural default rules." Mann v. Dugger, 817 F.2d 1471, 1488 (11th Cir. 1987)(Clark, J., concurring). See also Michigan v. Long, 463 U.S. 1032 (1983); Ulster County v. Allen, supra; Spencer v. Kemp, supra.[10]

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[10] What the Florida Supreme Court never said in Mr. Mann's case is noteworthy. During the litigation of Mr. Mann's state-court post-conviction actions, that court never used the language which it uses in every other case in which it applies a procedural bar--that claims would not be heard because they "should have been raised" on direct appeal or "were not preserved" by objection at trial. See, e.g. James v. State, 489 So.2d 737, 738 n.1 (Fla. 1986); Porter v. State, 478 So.2d 33, 36 (Fla. 1985). The Florida Supreme Court, after all, knows how to apply a procedural bar -- when it believes a claim should be foreclosed by the application of a default rule, it will clearly say so. See, e.g., James, Porter. It did not clearly say so here.

Beyond this, Mr. Mann relies on the analysis presented in his initial brief.[11]

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[11] We note that Florida specifically provides a criminal defendant with the absolute right to be present at all stages of trial at which testimony is taken. See Fla. R. Crim. P. 3.180; Francis v. State, 493 So. 2d 1175 (Fla. 1982). As explained in the initial brief, Mr. Mann never waived his right to be present during the taking of testimony at the "jury viewings." The jury was nevertheless shepherded to five different locations, and substantial testimony was taken. This denied Mr. Mann his Sixth and Fourteenth amendment rights, and his State-created liberty interest. See Hicks, supra, 447 U.S. at 346-47; Vitek, supra, 445 U.S. at 488; Hewitt v. Helms, 459 U.S. 460, 467 (1983).

This also abrogated Mr. Mann's Eighth Amendment rights. Presence at a capital trial is nonwaivable. Cf. Proffitt v. Wainwright, 685 F.2d 1227, 1256-58 (11th Cir. 1982), modified, 706 F.2d 311 (11th Cir. 1983). In any event, the procedures by which Mr. Mann was denied his right to presence in this case simply do not comport with the Eighth Amendment's requirement of heightened scrutiny in capital cases. Cf. Gardner v. Florida, 430 U.S. 349 (1977).

III

THE DEATH SENTENCE IMPOSED ON MR. MANN WAS OBTAINED IN SUBSTANTIAL RELIANCE ON AN UNCONSTITUTIONAL PRIOR CONVICTION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

Mr. Mann relies on the arguments presented in his initial brief. We note, however, that Judge Johnson's panel opinion analysis was accurate: the Florida Supreme Court had not, prior to Mr. Mann's second direct appeal, pronounced a procedural bar against raising this type of claim in collateral proceedings. Adams v. State, 449 So.2d 819 (Fla. 1984), the case cited by the State as demonstrating that "Judge Johnson's statement that the Florida Supreme Court has not previously pronounced on this matter," was erroneous (State's Brief, p. 54), was decided two years after Mr. Mann's second direct appeal. See Mann v. State, 420 So. 2d 578 (Fla. 1982). The State does not attempt to explain, for obvious reasons, how this decision could have "fairly apprised" Mr. Mann in 1982 that his claim would be procedurally barred if not asserted on direct appeal. See Spencer, supra; Wheat v. Thigpen, supra. It is black letter habeas law that the novel application of a procedural bar is an insufficient obstacle to a petitioner's right to be heard on a federal claim, Spencer; Wheat, and that bars that are not fairly, clearly and evenhandedly applied to all litigants cannot be deemed "adequate and independent." Henry v. Mississippi, 379

U.S. 433, 447-48 (1958); Tollett v. Henderson, 411 U.S. 258, 266 (1973); Lefkowitz v. Newsome, 420 U.S. 283, 293 (1975); NAACP v. Alabama, 347 U.S. 449, 455 (1958); James v. Kentucky, 104 S. Ct. 1830, 1835 (1984). It is this type of unconstitutional bar which the State requests that this Court apply in Mr. Mann's case.[12]

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[12] Two other matters should be noted with regard to the State's contentions on this claim. First, the assertion that the Mississippi conviction, Mann v. State, 490 So. 2d 910 (Miss. 1986), rests on "adequate and independent state grounds" (State's Brief, p. 53) is simply wrong. That conviction rests precisely on the inadequate and nonindependent state bar condemned by the Fifth Circuit in Wheat v. Thigpen. Second, Zant v. Stephens, 462 U.S. 862 (1983), United States v. Tucker, 404 U.S. 443 (1972), and Burgett v. Texas, 389 U.S. 109 (1967), involve "misinformation of constitutional magnitude" -- the "misinformation" which violates the Eighth Amendment and Due Process Clause is not limited solely to "uncounseled" prior convictions, and Florida had not so restricted a criminal defendant's challenges in the past (as discussed in Mr. Mann's initial brief).

IV

MR. MANN'S SENTENCE OF DEATH VIOLATES DOYLE V. OHIO AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE IT WAS BASED ON A RECOMMENDATION OF DEATH OBTAIEND FROM A JURY WHICH WAS TOLD THAT MR. MANN "SHOWED" NO REMORSE AFTER A POST-ARREST, POST-MIRANDA WARNINGS INVOCATION OF HIS RIGHT TO SILENCE

The State concedes that Mr. Mann's post-arrest, post-Miranda v. Arizona, 384 U.S. 436 (1966), silence was used against him at the sentencing phase of his trial to rebut mitigating evidence. (See State's Brief, p. 57 ["[i]t is clear that Brooks' testimony was used to rebut the evidence in mitigation"]). The State thus concedes that Mr. Mann was penalized for the exercise of his right to silence, see Doyle v. Ohio, 426 U.S. 610 (1976), and therefore that his rights under the Fifth, Sixth, Eighth and Fourteenth amendments were violated. See also Wainwright v. Greenfield, 106 S. Ct. 634 (1986).

Mr. Mann introduced evidence of his mental condition as mitigation against the death penalty. The State put on the testimony of officer Brooks to rebut the psychiatric testimony offered in mitigation (see ROA 2374; State's Brief at 57) and as affirmative proof of aggravation -- purportedly to show lack of remorse. In all pertinent respects, therefore, Mr. Mann's case is identical to Wainwright v. Greenfield. There, the use of a defendant's post-Miranda silence to rebut an insanity defense violated due process. Here, the Eighth Amendment was also

violated. The use of post-Miranda silence under these circumstances is precisely what Doyle condemned:

> The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the state gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations.

Greenfield, 106 S.Ct. at 639.

It is not clear just how Mr. Mann put his post-Miranda behavior in Mississippi at issue in his Florida capital sentencing proceeding (See State's Brief at p.57). It is clear that a defendant does not do so by asserting a mental health defense. Greenfield, supra. It is also clear that the only circumstances under which "Doyle does not prohibit the prosecution from presenting post-arrest [and post-Miranda] behavior [silence] to refute the defendant's testimony" (State's Brief at 57) is when a defendant testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. Doyle, 426 U.S. at 621 n.11. This is plainly not the case here.

Mr. Mann's post-Miranda silence was used both to rebut mitigation and to establish aggravation. It was used to sentence him to death Under such circumstances, the Doyle violation which occurred here cannot be harmless error. The jury heard it and the prosecutor forcefully argued it. It could not but have affected the jury, and, as discussed earlier, the jury's verdict is critical.[13]

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[13] With regard to the State's procedural default contentions, Mr. Mann respectfully refers the Court to the discussion presented in Claim II, supra. That analysis applies with full force to Mr. Mann's Doyle/Greenfield claim.

CONCLUSION

The district court's denial of the writ should be reversed; Mr. Mann's case should be remanded for an evidentiary hearing; and Mr. Mann should be granted the habeas corpus relief he seeks.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Gary Welch and Michael Kotler, Assistant Attorneys General, Department of Legal Affairs, Park Trammell Building, Suite 804, 1313 Tampa Street, Tampa, Florida 33602, this 7th day of December, 1987.

Attorney